TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 209

DETROIT AND MACKINAC RAILWAY COMPANY,
APPELLANT,

vs.

MICHIGAN RAILROAD COMMISSION, CHURCHILL LUMBER COMPANY, ISLAND MILL COMPANY, FLETCHER PAPER COMPANY, AND FRANK R. GILCHRIST, WILLIAM A. GILCHRIST, GRACE GILCHRIST FLETCHER, AND RALPH E. GILCHRIST, EXECUTORS OF THE ESTATE OF FRANK W. GILCHRIST, DECEASED.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JUNE 28, 1913.

(23,767)

(23,767)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 616.

DETROIT AND MACKINAC RAILWAY COMPANY, APPELLANT,

vs.

MICHIGAN RAILROAD COMMISSION, CHURCHILL LUMBER COMPANY, ISLAND MILL COMPANY, FLETCHER PAPER COMPANY, AND FRANK R. GILCHRIST, WILLIAM A. GILCHRIST, GRACE GILCHRIST FLETCHER, AND RALPH E. GILCHRIST, EXECUTORS OF THE ESTATE OF FRANK W. GILCHRIST, DECEASED.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 14, 1913.

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Transcript of Record.

BILL OF COMPLAINT.

(Filed Aug. 17, 1912.)

UNITED STATES OF AMERICA.
THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

To the Honorable the Judges of said Court:

Your orator the Detroit and Mackinac Railway Company respectfully represents and shows unto the court:

1. Your orator is a railroad corporation organized and existing under the laws of the State of Michigan, with its principal office located in the City of Detroit, in the Eastern District of Michigan, and it owns and operates a railroad extending from Bay City to Cheboygan in said district and passing through the City of Alpena, and other intermediate points, and it also has a number of branch lines.

2. The jurisdiction of the court is invoked on the ground that the matter in controversy, hereinafter set forth, exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the constitution of the United States. This bill is filed to protect the property and rights of your orator under the provisions of the Fourteenth Amendment of the constitution of the United States, that no State shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The railroad of your orator being wholly within the State of Michigan, it is subject to the jurisdiction of the Michigan Railroad Commission, created and existing under an act of the State Legislature approved June 2, 1909, and the amendments thereto approved April 25, 1911, and April 26, 1911. (Michigan Public Acts, 1909. No. 300, p. 704; Id. 1911, pp. 205, 293.)

4. Upon a complaint made to it by Frank W. Gilchrist, The Churchill Lumber Company and The Island Mill Company, The Michigan Railroad Commission on the 22nd day of October, 1909, granted an order reducing the rates of your orator for the transportation of logs from the private logging tramways of Alpena Lumbermen and others to the City of Alpena; and on the 3rd day of November, 1909, the Commission granted a supplementary order fixing the minimum rates per car on carload shipments of logs. Copies of said orders are annexed to this bill as Exhibit A and B.

5. Under the permission granted by Sec. 26 of said Act of the State Legislature your orator on the 22nd day of November, 1909, filed its bill of complaint against the Michigan Railroad Commission in the Circuit Court for the County of Wayne, in Chancery to vacate and set aside said orders of the Commission of October 22, 1909 and November 3, 1909, on the ground that the rates and charges fixed by said orders are unlawful and unreasonable; that the Commission was served with a subpoena and a copy of the bill of complaint; that the Commission filed its answer to the bill; that the Fletcher Paper Company, and Frank W. Gilchrist, The Churchill Lumber Company, and The Island Mill Company, were allowed to intervene in the case, and they filed answers to the bill of complaint; that on the 31st day of May, 1909, your orator by leave of the court, filed amendments of its bill of complaint, and answers thereto were filed by the Commission and by said intervening defendants; that the cause being at issue it was heard in the Wayne Circuit before the Hon. James O. Murfin, Circuit Judge; that the testimony taken before the Railroad Commission was introduced and additional testimony was taken in open court and also before an examiner, and reported to the court; that the additional testimony so taken was transmitted to the Commission, and its action thereon was reported to the court; that thereupon the cause was argued and submitted to the court; that on the 21st day of January, 1911, Judge Murfin filed his opinion in the cause, and on the 11th day of February, 1911, he denied a motion for a rehearing, and granted a decree affirming the said orders of the Railroad Commission and dismissing the bill of complaint of your orator; that your orator took and perfected an appeal from the said decree of the Wayne Circuit to the Supreme Court of Michigan and the case was argued and submitted to that court; and on the 22nd day of July, 1912, the opinion of the court by Mr. Justice Ostrander was filed, and a decree entered affirming the decree of the Wayne Circuit.

6. That in the proceedings so had before the Michigan Railroad Commission, the Circuit Court for the County of Wayne in Chancery, and the Supreme Court of Michigan, your orator contended and showed by clear, uncontradicted and conclusive evidence.

(1) That the logging tramways connecting with the railroad of your orator are the private property of the several lumbermen who make use of them; that your orator does no public business as a common carrier on them and they are no part of its public railway, and therefore they are not subject to regulation or control by the Michigan Railroad Commission, or by any other governmental authority whatever; and that the said orders deprive your orator of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(2) That the rates fixed by said orders for the hauling of logs from said logging tramways, are less than the actual cost of the service, and much less than the actual cost and a fair profit, and said rates are therefore unreasonable, and confiscatory, and deprive your orator of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(3) That the rates fixed by said orders for the hauling of logs from said logging tramways to Alpena would seriously impair the general net income and profits of your orator, and reduce the same to less than it is entitled to earn upon the fair value of its property devoted to the public use; and said rates if enforced would deprive your orator of its property without due process of law, and deny to it the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

7. That the provisions of said Act of the Legislature of Michigan that the rates fixed by the Railroad Commission shall be in force and shall be prima facie lawful and reasonable until finally found otherwise, and that the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, are fair upon their face; but they were construed and enforced by the Railroad Commission and by the Circuit Court for the County of Wayne, and by the Supreme Court of the State, with an evil eye and a strong hand, and held to be conclusive evidence, and practically incapable of being overcome by a preponderance of clear and satisfactory evidence; and so construed and enforced, said provisions are in conflict with the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States.

8. Your orator has with prudence and care exhausted all the remedies accorded it by the laws of the State for the relief it is entitled to receive in the premises; and it is now entitled to invoke the jurisdiction of the federal courts; that if your orator should make an application to the Railroad Commission for a revision or revocation of its said orders, under the authority of the said Act of the Legislature, or the permission of the Supreme Court of the State in its said opinion, the rates fixed by the Commission would immediately, and pending any such application, become operative and in full force and effect; that said intervening defendants and all other shippers of logs would not, in case your orator was finally successful, be liable for any additional rates or charges beyond the rates of the Commission, which they had paid; and if liable many of them would not be possessed of property subject to execution out of which judgment against them could be made; that your orator would suffer irreparable loss and injury and is entitled to injunctive relief for the preservation of the statu quo, if it will furnish such bond as the court may require and approve to refund to shippers the rates and charges it may collect in excess of the rates fixed by the Commission, in case the rates of the Commission are finally sustained. Your orator offers to furnish such a bond.

9. That the railroad of your orator north of Alpena was originally built northwesterly as far as La Rocque, and from thence southwesterly to a point known as Valentine Lake, as a logging road by Alger, Smith & Company, who were engaged in cutting and getting out the pine timber tributary to it; that Alger, Smith & Company, incorporated it under the laws of Michigan as the Alpena & Northern Railroad, and used it for logging purposes until the pine timber was nearly exhausted, when they sold it to your orator; that your orator was organized in 1895, as the Detroit and Mackinac Railway Company, which is your orator.

10. That your orator also acquired the railroad which ran from Alger (a station on the Michigan Central, north of Bay City) to Alpena, and thus your orator started Feb. 1, 1895, with a railroad which extended from Alger to LaRocque, with a logging branch running from LaRocque to Valentine Lake; that in the year 1896 your orator built an extension of its main line from Emery Junction to Bay City; that in 1897 your orator extended its main line from LaRocque to Onaway; in 1899 from Onaway to Tower; in 1903 from Tower to Cheboygan; that the gross earnings and total income of your orator for the five months ending June 30, 1895, and for each subsequent year ending at the same date, and your orator's operating expenses and taxes for the same periods, and its net income, are shown by the following table:

June 30, 1895.

Total income	177,592.45
Operating Expenses & Taxes.....	87,957.88
Net Income	89,634.57

1896.

Total Income	434,462.37
Operating Expenses & Taxes.....	308,829.51
Net Income	125,632.86

1897.

Total Income	406,681.70
Operating Expenses & Taxes.....	309,817.83
Net Income	96,863.87

1898.

Total Income	431,467.90
Operating Expenses & Taxes.....	311,147.25
Net Income	170,650.99

1899.

Total Income	601,440.85
Operating Expenses & Taxes.....	10,650.99
Net Income	190,789.86

1900.

Total Income	833,619.41
Operating Expenses & Taxes.....	553,851.80
Net Income	278,767.61

1901.

Total Income	865,747.12
Operating Expenses & Taxes.....	615,159.59
Net Income	250,586.53

1902.

Total Income	862,191.80
Operating Expenses & Taxes.....	603,864.43
Net Income	258,327.37

1903.

Total Income	953,708.23
Operating Expenses & Taxes.....	667,143.78
Net Income	286,664.45

1904.

Total Income	981,314.83
Operating Expenses & Taxes.....	673,537.46
Net Income	307,777.37

1905.

Total Income	990,554.78
Operating Expenses & Taxes.....	705,574.66
Net Income	284,980.12

1906.

Total Income	1,154,826.46
Operating Expenses & Taxes.....	951,672.76
Net Income	203,152.70

1907.

Total Income	1,311,274.80
Operating Expenses & Taxes.....	1,091,354.19
Net Income	219,920.61

1908.

Total Income	1,194,410.69
Operating Expensess & Taxes.....	887,653.65
Net Income	306,757.04

1909.

Total Income	1,164,748.86
Operating Expenses & Taxes.....	881,389.52
Net Income	283,359.34

1910.

Total Income	1,249,624.51
Operating Expenses & Taxes.....	953,037.56
Net Income	296,596.45

1911.

Total Income	1,209,960.56
Operating Expenses & Taxes.....	953,037.56
Net Income	296,596.45

1912.

Total Income	1,265,190.82
Operating Expenses & Taxes.....	995,027.07
Net Income	270,163.75

11. Although your orator has exercised great skill and efficiency in developing, soliciting and securing business, and has been very prudent and economical in its expenditures for operating expenses and has been wise in its general management, yet, it has not been able in any year since it was organized, except the year ending June 30, 1904, and the year ending July 30, 1908, to earn a net profit of six per cent on the then value of its railroad and property devoted to the public use.

The Michigan Railroad Commission pretends and claims, and in the report of the Commission made to the Wayne Circuit Court on the additional evidence transmitted to it, made the statement, which was given credence by the Supreme Court of the State, that the annual report of your orator for the year ending June 30, 1910, on file with the Commission, showed a net profit of 8 7/10 per cent on the valuation of $4,585,000 alleged in your orator's amended bill; but your orator shows that the Commission in figuring that percentage failed to add to the operating expenses or to otherwise deduct from the gross income, the sum of $103,584.84, your (orator)

paid out that year for taxes assessed against its railroad property which reduced the percentage of profit to 5 9/10 per cent on a valuation of the property of $5,000,000.

12. Your orator's railroad and property devoted to the public use was in 1909 of great value to-wit: of the value of $5,500,000, after making all proper and necessary deductions for depreciation, from wear and tear, age or absolence, and that there has been an increase in the value of the road in 1910 and 1911 and 1912, to-wit: an increase of $500,000 making the present value of the property at least $6,000,000.

The property comprises 196.24 miles of main line from Bay City to Cheboygan; and 103.04 miles of branch lines of railroad; 103.96 miles of yard tracks and sidings; together with a large number of passenger depots, freight houses and sheds, water tanks and other structures necessary for a railroad.

The equipment consists of 13 passenger locomotives, 17 freight locomotives, and 3 switching engines; 29 first class passenger cars, 5 combination cars, 2 parlor cars, 1 cafe car, and 9 baggage, express and postal cars; 8 refrigerator cars, 535 box cars, 391 coal cars, 518 flat cars, and 96 stock cars, and 52 caboose, derrick and other cars, in the company's service.

The Michigan Railroad Commission has never made an inventory and appraisal of the railroad property of your orator with the view of placing a valuation upon it for rate making purposes, and wholly ignored the value of the property, in fixing the rates set forth in said orders of October 23, and November 3, 1909.

13. The pine timber tributary to the railroad of your orator was substantially all exhausted by 1897; that there was still left patches and tracts, (varying in area and the amount of timber thereon) of hardwood and hemlock, the products of which were marketable if they could be brought to the railroad of your orator; that timber owners or lumbermen desiring to cut and market their timber would furnish and own the right of way would do the grading and furnish the ties, and your orator would furnish the rails and lay them and do what little ballasting was necessary to hold the track in place; and on these private logging branches and tramways your orator would send in, with a small engine adapted to that kind of service, flat cars and place them at the skidways of the lumbermen, and when they had loaded their logs on the cars, your orator would bring them to the main line, and transport them to the several mills or plants of

the lumber men, who were for the greater part located at Alpena and to a limited extent at Cheboygan and other points on the main line; that the question whether your orator would furnish and lay the rails and render the service would depend on the amount of timber the lumberman had to haul, and the length of time in which he would cut his timber and have it hauled; that each lumberman owned and controlled his own tramway, and if any other timber owner or lumberman desired to make use of it, he was at liberty and entitled to charge compensation therefor, consisting sometimes of the like use of their own several tramways, and sometimes for a money compensation exacted and paid; that your orator did no business as a common carrier on said tramways, and there was no public or population tributary to them; no public freight or passenger service, no regular train, and no regular trains for the logging service; that said tramways were not built for any regular traffic, were not capable of being used for regular traffic and when the timber of a lumberman was exhausted your orator would take up the rails on his tramway and use them on some other private tramway; that said tramways were temporary structures and no part of the public or statutory railroad of your orator, and were always so regarded by your orator and by the several lumbermen; that the compensation your orator would receive for this service was a matter of agreement between it and each lumberman, sometimes expressly fixed and sometimes left to such reasonable compensation as your orator might be entitled to receive; that because of their heavier weight your orator received a higher compensation for hauling hardwood logs than hemlock.

14. There was considerable complaint from the lumbermen about the different rates on different kinds of logs, because that made it necessary to sort their logs when placing them on the skidways, and to separate the hardwood from the hemlock; that the Churchill Lumber Company was paying from La Rocque to Alpena $2.50 per thousand on hemlock and $3.25 per thousand on hardwood, and from points above La Rocque to Alpena, $2.75 per thousand on hemlock and $3.75 per thousand on hardwood; that Feb. 12, 1907, the Churchill Lumber Company requested your orator to give it a rate of $2.75 per thousand on mixed logs from La Rocque to Alpena, and $3.00 per thousand from points above La Rocque; and your orator assented to those rates.

15. That representatives of your orator and of the Alpena Lumber men had a conference at Alpena in November, 1908; that the lumbermen wanted a flat rate on mixed logs of

$3.00 whether the haul was ten miles from Alpena or sixty miles from Alpena; that your orator gave them the $3.00 rate from points as far north as Millersburg, and $3.25 from points beyond Millersburg; that these rates were the result of mutual concessions and agreements, the lumber men getting rates on mixed logs, and your orator getting reasonable compensation for the service to be rendered; that the rates the Churchill Lumber Company was paying from points above and points below La Rocque were each increased 25 cents per thousand of mixed logs, but said company made no complaint to your orator on that ground; and no complaint was ever made to your orator or to the Michigan Railroad Commission by any of the Alpena lumbermen, that the rates so agreed upon were unreasonable or in any way excessive.

16. On the 23rd day of February, 1909, the Fletcher Paper Company by Frank W. Fletcher its president, made a complaint to the Michigan Railroad Commission charging discrimination by your orator against Alpena in its rates on lumber products, but it appeared by the answer of your orator that the Fletcher Paper Company was engaged in the manufacture of paper, and not in the manufacture of lumber or in the commercial lumber business; that the prosecution of said complaint was thereupon abandoned and no order was ever made thereon by the Commission.

17. On the 19th day of April, 1909, Frank W. Gilchrist, the Churchill Lumber Company, and the Island Mill Company, all three being engaged in the lumber business in Alpena, at the instigation of the Fletcher Paper Company and Frank W. Fletcher its president, did make a complaint to the Michigan Railroad Commission, that your orator was charging higher rates for the transportation of logs to Alpena than to Cheboygan; which was true, and thereupon your orator made the same rates to Cheboygan, as it was realizing on shipments to Alpena; that the Michigan Railroad Commission without receiving any other complaint, and without making any charge or statement on its own initiative, as required by sub section C. of section 22 of said Act of the State Legislature, proceeded to investigate the question whether the rates of $3.00 and $3.25 on mixed logs which were being received by your orator were unreasonable; and against the protest and objections of your orator granted its said orders of October the 22nd and November 3, 1909.

Your orator respectfully submits that this action of the Commission without any complaint, charge or accusation, would if said orders are enforced, deprive your orator of its property without due process of law and deny to it the equal

protection of the laws within the meaning of the Fourteenth Amendment of the constitution of the United States.

18. That the said rates of $3.00 and $3.25 so agreed upon, and collected and received by your orator for hauling logs from the said several tramways to Alpena, are reasonable and no more than the cost of the private service so rendered and a fair profit thereon; said rates so far as they exceed the rates charged for the transportation of logs received at and hauled on the main line, being for the private service on the tramways.

The difference between the two kinds of rates is shown by a comparison of said $3.00 and $3.25 rates with the mileage rates fixed by your orator's published tariff No. 205, for service on the main line where this is no tramway service, and which are the rates fixed by the Railroad Commission.

The following table shows the contract rates, the main line rates and the tramway rates.

There are no logs and no tramways south of La Rocque and north of Alpena, except the Kimball tramway at Polaski, and the other intermediate stations are therefore omitted.

	Contract Rates.	Main Line Rates.	Tramway Rates.
Polaski	$3.00	$1.33	$1.67
La Rocque	3.00	1.67	1.33
Bunton	3.00	2.00	1.00
Millersburg	3.00	2.00	1.00
Case	3.25	2.00	1.25
Onaway	3.25	2.00	1.25
Towe	3.25	2.33	.92
Waveland	3.25	2.33	.92
Aloha	3.25	2.33	.92
Cheboygan	3.25	2.33	.92
Legrand	3.25	2.33	.92

19. The Michigan Railroad Commission and the other defendants herein claim and pretend that your orator has filed with the Commission and published tariffs for hauling logs on the private tramways of timber owners and lumbermen, and that your orator has thereby made said tramways a part of its public railroad and subjected them, and the rates for service thereon, to the jurisdiction of the railroad commission; but your orator shows that it never has filed or published any tariffs specifically fixing rates for such service; that the tariffs filed by it always fixed the rates for the entire service on the tramways and the main line to the point of destination; that the contracts your orator entered into with timber owners and lumbermen possessing their own tramways, always fixed, either expressly or impliedly, the rates for the whole service, and not a separate rate for the tramway service, and another rate for

the main line service; that the tariffs filed by your orator have always respected these contracts, and fixed the rates agreed upon; that when your orator contracted with the Alpena lumbermen to give them a $3.00 rate as far north as Millersburg and a $3.25 rate beyond Millersburg, it filed a tariff in accord therewith, and January 20, 1909 a corrected tariff was filed which is known as "M. R. C. 205", and one of the original printed copies thereof is annexed to this bill as Exhibit C. thereof; that your orator had no intention in filing said tariff to affect or impair the contract it had made with the Alpena lumbermen or to confer on the Railroad Commission jurisdiction over it, or power to impair it; that isasmuch as the rates agreed on included the service on the main line, your orator deemed it prudent if not absolutely necessary, that your orator should file said tariff 205 with the railroad Commission; that your orator assumes that it has no right to defeat, impair, or in any way to affect a valid contract on its part, by filing a tariff with the Railroad Commission, and your orator says that it had no such intention when it filed said tariff, or any other like tariff.

20. Your orator's railroad is not a part of any trunk line, and it has no traffic in passengers or freight except such as originates or terminates on its own line of railroad or its branches; that 70 per cent and upwards of the total annual income of your orator is derived from freight and 50 per cent of this or 35 per cent and upwards of the whole, is derived from logs, lumber and other forest products; that the timber tributary to the road south of La Rocque is already exhausted and that north of La Rocque will be in four or five years; that the pine lands from which the pine has already been taken, are of but little value for general farming purposes and have not been occupied by farmers and will not be for many years; that the hardwood lands are good farming lands, but the season is short, killing frosts occuring as late as June 1, and as early as September 1, and these lands have not been taken up by farmers, and will not be until the over population of the country, forces the people to these northern lands; that a railroad which runs into an agricultural region without any through or trunk line business, cannot be financially successful; that in view of these and other material facts your orator under our constitutional guarantees is entitled to build up a reserve or sinking fund to protect it from the loss of revenue from logs, lumber and other forest products which is sure to come; that the prevailing rate of interest in Alpena and Presque Isle counties on real estate and gilt edged commercial paper is 7 per cent; that the banks earn more than 12 per cent, and you orator has been informed

and believes and charges the fact to be that lumber companies and individual lumbermen, and other manufacturing concerns making use of timber and forest products earn 20 per cent; that there are no other criteria on which to found a correct judgment as to the percentage of net profit your orator is entitled to earn on the value of its property; that under all the facts and circumstances your orator is entitled to earn at the least 10 per cent and any governmental regulation which reduces that percentage is confiscation.

21. Your orator has water competition at Alpena and both railroad and water competition at Cheboygan; that 90 per cent of the lumber manufactured at Alpena from the logs transported to that point by your orator, is shipped out by water; that in view of this fact, your orator in said tariff 205, agreed to give a rebate or refund of 50 cents per thousand feet on logs when an equal amount of manufactured product is shipped out by your orator's railroad; that said refund is not to be taken as a rebate on the rates for service on the main line or public railway of your orator but as reduction of the rates for the service on the private tramways of the timber owners and lumbermen; that as long as such rebate does not intrench upon or reduce the rates for the main line and public service, it is not an infringement or violation of the provisions of said Act of the legislature prohibiting rebates; that the order of the Railroad Commission of October 22, 1909, provides for the same rebate; but your orator submits that the Railroad Commission has no power to force any such rebate upon your orator and that the same is illegal and void.

22. Your orator has no adequate remedy at law, and is only relievable by a suit in equity in this court.

23. The Michigan Railroad Commission consists of Cassius L. Glasgow, Chairman, George W. Dickinson and Lawton T. Hemans; and inasmuch as the said Frank W. Gilchrist, The Churchill Lumber Company, The Island Mill Company and the Fletcher Paper Company are also by section 47 of said Act of the State Legislature, authorized to institute proceedings to enforce said orders, and your orator seeks injunctive relief against them, they are made parties defendants to this bill.

PRAYER FOR RELIEF.

Your orator prays that the defendants herein, the Michigan Railroad Commission, and its members Cassius L. Glasgow, George W. Dickinson and Lawton T. Hemans; and Frank W. Gilchrist, The Churchill Lumber Company, The Island Mill Company, and the Fletcher Paper Company, may be required to answer this bill paragraph by paragraph, an-

swers under oath being hereby expressly waived, and that relief may be granted to your orator as follows:

1. That the said orders of October 22, and November 3, 1909, of the Michigan Railroad Commission, so far as they purport or were intended to apply to the private tramways or logging branches of timber owners or lumbermen, may be declared unlawful and beyond the powers and jurisdiction of the Michigan Railroad Commission, or of the State Legislature, or any other governmental authority or agency; and that they are in conflict with the due process of law, and the equal protection of the laws, clauses of the Fourteenth Amendment of the constitution of the United States.

2. That the rates fixed by said orders may be declared and decreed to be unreasonable and confiscatory, and a deprivation by the State of Michigan of the property of your orator without due process of law in violation of the Fourteenth Amendment of the constitution of the United States.

3. That it may be declared and decreed that said orders require your orator to perform the service of hauling logs from the tramways or logging branches of timber owners and lumbermen for less than the cost of that service and a fair profit, and are in conflict with the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

4. That the provisions of section 25, and 26 of Act No. 300 of the Public Acts of Michigan of 1909, that the rates fixed by the Railroad Commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise, and that the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable as construed and enforced by the State authorities, is in conflict with the due process of law and the equal protect of the laws clauses of the Fourteenth Amendment of the Constitution of the United States.

5. That a competent special examiner may be appointed by the court to take the testimony in the case, and make a finding of facts to be reported to the court, and that such proceedings may be had hereon as the rules and practice of the court may permit or require.

6. That an injunction may be granted and issued restraining the defendants herein until the final hearing of the cause from enforcing or attempting to enforce by any action, proceeding or otherwise the said orders of October 22, and November 3, 1909, of Michigan Railroad Commission, and that on the final hearing such injunction may be made perpetual.

7. That your orator may have such other or further relief as justice and equity may require.

PRAYER FOR PROCESS.

Your orator prays that a subpoena for the appearance of said defendants, the Michigan Railroad Commission, Cassius L. Glasgow, George W. Dickinson, Lawton T. Hemans, Frank W. Gilchrist, The Churchill Lumber Company, The Island Mill Company and The Fletcher Paper Company, and that temporary and perpetual writs of injunction may be issued as is above prayed, all in accordance with the rules and practice of the court.

And your orator will ever pray, etc.

(Signed) Detroit & Mackinac Railway Co.,
Complainant.
By George M. Crocker,
Auditor and 2nd Vice Pres.

James McNamara.
Solicitor for Complainant.
Fred A. Baker,
Of Counsel.

United States of America, Eastern District of Michigan, ss:

On this 17th day of August, 1912, before me a United States Commissioner in and for said District personally appeared George M. Crocker and made oath that he is the Auditor and Second Vice President of the Detroit & Mackinac Railway Company and has read and knows the contents of the above and foregoing bill of complaint by him subscribed, and that the same is true of his own knowledge, except as to the matters and things therein stated to be on information and belief and as to such matters and things he believes the same to be true.

(Signed) Carrie Davison,
United States Commissioner, Eastern District of Michigan.
(Commissioners' Seal.)

EXHIBIT "A."

ORDER OF RAILROAD COMMISSION.

State of Michigan—Before the Michigan Railroad Commission.

At a session of the Michigan Railroad Commission, held at its offices in the City of Lansing, on the 22nd day of October, A. D. 1909.

F. W. Gilchrist, Churchill Lumber Company, Island Mill Company,

Complainants,

vs.

Detroit & Mackinac Railway Company,

Defendant.

D-188.

Complaint having been made by the above named complainants charging that the above named defendant by its public tariff now in effect for the transportation of logs to the City of Alpena, State of Michigan, is charging rates that are unjust and unduly discriminatory, and issue having been enjoined thereon by the said parties and a hearing having been had wherein the parties were present and represented by counsel, and the evidence and arguments of counsel having been duly considered by the Commission, the Commission doth find that the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth.

Now therefore, by virtue of the authority vested in us by law, it is hereby ordered that the Detroit & Mackinac Railway Company do publish, file and put into operation so as to become effective twenty (20) days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena, as follows:

Ten (10) miles or less not to exceed one dollar ($1.00) per thousand (1,000) feet;

Over ten (10) miles, and not exceeding twenty (20) miles, not to exceed one dollar and thirty-three cents ($1.33) per thousand (1,000) feet;

Over twenty (20) and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand (1,000) feet;

Over thirty (30) and not exceeding fifty (50) miles, not to exceed two dollars ($2.00) per thousand (1,000) feet;

Over fifty (50) and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet;

Above rates to apply when the manufactured product is reshipped via defendant company's line and when not to be so reshipped, that defendant company are authorized to collect in addition to said rate, fifty cents (50¢) per thousand (1,000) feet, but if later reshipment is made over defendant company's

line, they are to refund to such shipper the fifty cents (50¢) per thousand (1,000) feet collected and

It is further ordered that the books of both defendant company and complainants (and all other shippers of logs affected by this order) shall show plainly the total of inbound shipments and the reshipment of the manufactured product, and

It is further ordered, that these rates apply to all classes of logs transported by said defendant to said city of Alpena within the distances above set forth.

George W. Dickinson,
James Scully,
Commissioners.

EXHIBIT "B".

SUPPLEMENTAL ORDER RAILROAD COMMISSION, STATE OF MICHIGAN—

Before the Michigan Railroad Commission.

At a session of the Michigan Railroad Commission held at its offices in the City of Lansing on the 3rd day of November, A. D. 1909.

F. W. Gilchrist, Churchill Lumber Company,
Island Mill Lumber Company,
Complainants,

vs.

Detroit & Mackinac Railway Company,
Defendant.

D-188.

SUPPLEMENTAL ORDER.

An order having been heretofore made in the above entitled cause on, to-wit, the 19th day of October, A. D. 1909, prescribing the rate on carload shipments of logs to the City of Alpena, originating on the defendant company's line, and it appearing to the Commission that the minimums to be applied in the application of the rates set forth in said order of October 19th, should be the same as set forth in defendant company's tariff, on file with this Commission and described as M. R. C. No. 208, G. F. D. No. 560 (corrected), and

It further appearing that the rate applying to Fletcher's Dam (formerly Broadwell's Dam), situated on defendant company's line, should be as the same rate to Alpena,

Now, therefore, by virtue of the authority vested in us by law, it is hereby ordered, that the said defendant company may

charge a minimum rate per car on carload shipments covered by this order the same as now appears in defendant company's tariff, described as M. R. C. No. 208, G. F. D. No. 560 (corrected), now on file with this Commission, to-wit:

Not to exceed ten (10) miles, three dollars ($3.00) per car;

Not to exceed twenty (20) miles, four dollars ($4.00) per car;

Not to exceed thirty (30) miles, five dollars ($5.00) per car;

Not to exceed fifty (50) miles, six dollars ($6.00) per car;

Not to exceed eighty (80) miles, seven dollars ($7.00) per car;

Not to exceed one hundred (100) miles, eight dollars ($8.00) per car;

Not to exceed one hundred and twenty-five (125) miles, nine dollars ($9.00) per car;

Not to exceed one hundred and fifty miles (150) miles, ten dollars ($10.00) per car; and

It is further ordered, that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad north of Fletcher's Junction the rate to Fletcher's Dam (formerly Broadwell's Dam), shall be the same as the rate to Alpena, and that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad south of Alpena the rate to Fletcher's Dam (formerly Broadwell's Dam), shall be the same as the rate to Alpena.

This order may be rescinded, altered or amended at any time when in the judgment on the Commission such action should be taken.

Cassius L. Glasgow,
Chairman.
George W. Dickinson,
James Scully,
Commissioners.

EXHIBIT "C".

This Tariff Will Have No Supplement.

M. R. C. No. 205 — G. F. D. No. 555.
Cancels M. R. C. No. 198 — Cancels G. F. D. No. 548
Advance Reduction.
"Turtle Route"

DETROIT & MACKINAC RAILWAY COMPANY.

Local Freight Tariff On Logs (All Kinds, carloads) Minimum 2500 feet per car To Alpena, Mich.

From	Rates per Thousand feet.
Alcona	Mich. $3.00
Aloha	" 3.25
Au Sable	" 3.25
Black Lake Quarry (Black Lake Branch)	" 3.25
Black River	" 3.00
Bolton	" 3.00
Bunton	" 3.00
Case	" 3.25
Cathro	" 3.00
Cheboygan	" 3.25
/Clark's Mill (Cleveland Branch)	" 3.25
/End of Kimball Branch	" 3.00
/End of Wolverine "	" 3.25
/Gilchrist Spur (Laugh Branch)	" 3.25
Greenbush	" 3.25
Gustin	" 3.25
Handy	" 3.25
Harrisville	" 3.00
/Hurst (Hurst Branch)	" 3.00
LaRocque	" 3.00
/Le Grand	" 3.25
Lincoln	" 3.25
/Martindale Spur (Tubbs Branch)	" 3.25
Metz	" 3.00
Mikado	" 3.25
Millersburg	" 3.00
/Hill Spur (Indian River Branch)	" 3.25
Onaway	" 3.25
Ossinoke	" 3.00
/Paxton	" 2.50
Polaski	" 3.00
Posen	" 3.00
Tower	" 3.25
Waveland	" 3.25

The rates from intermediate points will be the same as the rates from the next more distant point from which rates are named.

A refund of 50 cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway.

/No regular train service. Shipment from these points handled at our convenience only.

Issued, Jan. 20, 1909. Effective, Feb. 1, 1909.

This tariff is governed by the rules, conditions and special instructions of Official Classification No. 33 M. R. C. No. 197 and supplements thereto, or subsequent issues thereof, also exceptions thereto, as shown in M. R. C. No. 200 and supplements thereto or subsequent issues, and subject to the terms and conditions printed in the Bill of Lading of this company.

For Storage, Car Service and Switching Rules and Regulations, see reverse side of this tariff.

T. G. Winnett,
General Freight Agent.
Bay City, Michigan.

Post on Page 37 of Tariff Book.

CAR SERVICE, STORAGE AND SWITCHING.

Freight transported, under this tariff will be subject to the rules and regulations relating to car service, storage and switching as published in Detroit & Mackinac Ry. Company's tariffs and supplements thereto or reissues thereof in effect at point of shipment and destination, and on file with the Michigan Railroad Commission. When traffic is destined to points beyond the tracks of this company, the rules and regulations of delivering road which is a party to this tariff will govern.

MOTION FOR INJUNCTION.

(Filed Aug. 21, 1912.)

UNITED STATES OF AMERICA.
THE DISTRICT COURT FOR THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit and Mackinac Railway Company,
Complainant.

vs.

Michigan Railroad Commission, Frank W. Gilchrist, The Churchill Lumber Company, The Island Mill Company, and the Fletcher Paper Company,
Defendants.

To said Defendants:

You are hereby notified that on the 26th day of August, 1912, at the opening of court on that day or as soon thereafter as counsel can be heard, the Complainant will move the court to grant a preliminary injunction in the above entitled case, as prayed in the Bill of Complaint therein, with a copy of which you are herewith served.

Jas. McNamara,
Solicitor for Complainant.

Detroit, Aug. 17, 1912.

To the Clerk:

Please place this motion on Judge Tuttle's docket for Aug. 26, 1912.

James McNamara,
Solicitor for Complainant.
Fred A. Baker,
Of Counsel.

THE DEMURRER OF DEFENDANTS FLETCHER PAPER COMPANY, FRANK W. GILCHRIST, THE CHURCHILL LUMBER COMPANY, AND THE ISLAND MILL LUMBER COMPANY.

(Filed Sept. 5, 1912.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Co.,

Complainant.

vs.

Michigan Railroad Commission, et al.,

Defendants.

These defendants say that the complainant has not stated such a case in its bill as entitles it to relief in a court of equity, for the following reasons:

1. Because the bill of complaint upon its face shows that it is filed for the sole purpose of again litigating a cause of action already finally determined between the same parties in the Circuit and Supreme Courts of the State of Michigan, and further shows upon its face that the relief sought by complainant is barred and complainant's rights in respect thereto adjudicated and concluded by the decree of the state court in said action.

2. Because the said bill of complaint does not state a cause of action arising under the constitution or laws of the United States, and states no other ground of federal jurisdiction.

3. Because the ultimate relief sought by said bill of complaint is the issuance of an injunction in violation of the provisions of section 720 of the revised statutes of the United States.

Gillett & Clark,

Solicitors for defendants Fletcher Paper Co., Frank W. Gilchrist, The Churchill Lumber Co. and the Island Mill Lumber Company.

Dated Sept. 4, 1912.

I hereby certify that I am the counsel having principal charge of this cause in behalf of the defendants, Fletcher Paper Company, Frank W. Gilchrist, Churchill Lumber Com-

pany, and the Island Mill Lumber Company, and that the above demurrer is not interposed for delay but that in my opinion it is well founded.

Edward S. Clark.

DEMURRER OF MICHIGAN RAILROAD COMMISSION.

(Filed Sept. 27, 1912.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit and Mackinac Railway Company,
Complainant.

vs.

Michigan Railroad Commission, et al.,
Defendants.

The demurrer of the Michigan Railroad Commission, one of the above named defendants to the bill of complaint of the above named complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows:

1st. That the said complainant has not in and by the said bill stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for.

2nd. That the matters and things complained of in said bill are res adjudicata.

3rd. That the said court is without jurisdiction to grant the relief or any part thereof demanded in and by said bill.

4th. That the bill of complaint upon its face shows that it is filed for the sole purpose of again litigating, a cause of action heretofore finally between the same parties upon original bill and answer, in the Circuit Court for the County of Wayne, in Chancery, State of Michigan, and upon appeal therefrom to the Supreme Court of the State of Michigan, whereby the relief sought by complainant is barred in this court and complainant's rights in respect thereto adjudicated and concluded in said courts of the State of Michigan.

5th. That complainant's remedy, if any exists, is by writ of error under section 709 of the revised statutes of the United States.

6th. That the said bill of complainant does not state a cause of action arising under the Constitution and laws of the United States, and states no other ground of federal jurisdiction.

7th. That the ultimate relief sought by said bill of complaint is the issuance of an injunction in the violation of the provisions of section 720 of the revised statutes of the United States.

Wherefore, and for divers other good causes of demurrer appearing upon said bill, this defendant demurs thereto. And it prays the judgment of this Honorable Court whether it shall be compelled to make any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

Roger I. Wykes,
Attorney General of the State of Michigan.
Charles W. McGill,
Assistant Attorney General of the State of Michigan, Counsel for defendant Michigan Railroad Commission. Business Address: Capitol, Lansing.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

Roger I. Wykes,
Attorney General of the State of Michigan.
Charles W. McGill,
Assistant Attorney General of the State of Michigan, Counsel for defendant Michigan Railroad Commission.

State of Michigan, County of Ingham, ss:

Cassius L. Glasgow, being duly sworn, deposes and says that he is president of the Michigan Railroad Commission the defendant named in the foregoing demurrer, and makes this affidavit for and in behalf of said defendant; that said demurrer is not interposed for delay and that the same is true in point of fact.

Cassius L. Glasgow,

Subscribed and sworn to before me this 13th day of September, A. D. 1912.

Rolla G. Karshner,
Notary Public, Ingham County, Michigan.
My Commission expires March 5, 1916.

OBJECTIONS, AFFIDAVITS, ETC., OF DEFENDANTS FLETCHER PAPER COMPANY, ET AL., TO APPLICATION FOR PRELIMINARY INJUNCTION.

(Filed Sept. 28, 1912.)

No. 5523.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Co.,

Complainant,

vs.

Michigan Railroad Commission, et al.,

Defendants.

The defendants Fletcher Paper Company, Frank W. Gilchrist, Churchill Lumber Company, and Island Mill Lumber Company, hereby appear specially (without submitting themselves generally to the jurisdiction of the court, or waiving any rights or remedies) and show cause as follows, why a temporary injunction should not issue herein as prayed in complainant's bill of complaint.

1. Because the relief sought by complainant herein is barred and complainant's rights in respect thereto adjudicated and concluded, by the decree of the Circuit Court for the County of Wayne, State of Michigan in Chancery, as affirmed by the opinion and decree of the Supreme Court of Michigan, in an action heretofore determined between the parties hereto and involving the same cause of action all of which appears from the bill of complaint filed herein and more fully appears from the copies of the printed record and briefs on the appeal of said action which are filed herewith, and from certified copies of the opinion and decree of the Supreme Court of Michigan in said cause, together with the affidavits of H. M. Gillett and Frank W. Fletcher, which are annexed hereto and made a part hereof.

2. Because the issuance of an injunction as prayed for is contrary to the provisions of section 720 of the Revised Statutes of the United States.

3. Because there is no equity on the face of the bill.

4. Because complainant has not exhausted its remedies before the Railroad Commission of the State of Michigan.

5. Because the bill of complaint does not state a cause of action within the jurisdiction of this court.

Fletcher Paper Company,
Frank W. Gilchrist,
Churchill Lumber Company,
The Island Mill Lumber Company,
By Gillett & Clark,
Their Solicitors.

Gillett & Clark,
Solicitors for said Defendants.
Dated September 17, 1912.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Co.,
Complainant,

vs.

Michigan Railroad Commission, et al.,
Defendants.

State and Eastern District of Michigan, County of Bay, ss:

Hezekiah M. Gillett, of Bay City, Michigan, being duly sworn, deposes and says that he is an attorney at law and that he was one of the solicitors for the intervening defendants and, as such, had principal charge in their behalf of a certain action prosecuted in the Circuit Court for the County of Wayne in Chancery, by the Detroit & Mackinac Railway Company as complainant and against the Michigan Railroad Commission as defendant, and the Fletcher Paper Company, Frank W. Gilchrist, Churchill Lumber Company, and the Island Mill Lumber Company, as intervening defendants, and that filed herewith are true copies of the printed record and briefs on the appeal of said cause to the Supreme Court of the State of Michigan, and annexed hereto are certified copies of the opinion and decree of said Supreme Court on the determination of such appeal.

H. M. Gillett,

Subscribed and sworn to before me this 16th day of September, 1912.

Jessie Thompson,
Notary Public, Bay County, Mich.
My Commission expires April 4, 1915.

OPINION OF THE SUPREME COURT OF THE STATE OF MICHIGAN.

(Filed July 22, 1912.)

STATE OF MICHIGAN SUPREME COURT.

IN EQUITY No. 5523.

The Detroit & Mackinac Railway Company,
Complainant and Appellant,

The Onaway Shingle & Tie Co., S. M. McTiver, W. Johnson, Fitzpatrick Bros., L. E. Clark, S. F. Derry & Co., C. R. Williams, R. P. Hollihan, Gardner Peterson & Co., D. A. Stratton, R. Mitchell, Hill & Lawler, Mathew Heslip, Wilson Pines & Sons, Robinson & Stevens, Albert Selke, M. G. Stevens, and J. W. Updegraph,
Intervening Complainants,

vs.

Michigan Railroad Commission,
Defendant and Appellee,
The Fletcher Paper Co., Frank W. Gilchrist, Churchill Lumber Co., and Island Mill Lumber Company,
Intervening Defendants.

Before Ostrander, C. J., Steere, Moore, McAlvay, Brooke, Blair, Stone, J. J.

Ostrander, C. J.

To the Michigan Railroad Commission four complaints were made against the complainant, the Detroit & Mackinac Railway Company, three of them by the Fletcher Paper Company of Alpena, Michigan, the other by F. W. Gilchrist,

Churchill Lumber Company, and Island Mill Lumber Company. Three complaints were answered by the railway company, a hearing was had, and the commission made three separate orders, one of them a supplemental order, dated, respectively, October 19, 1909, October 22, 1909, and November 3, 1909. In November of the same year, the railway company, being dissatisfied with the said orders, filed its bill in the Circuit Court for the County of Wayne, in chancery, against the said commission to vacate them. The parties complaining before the Michigan Railroad Commission were permitted to intervene as defendant in said suit, and certain other parties, claiming to be interested in and affected by the said orders, were permitted to intervene as complainants. Answers were filed and testimony, including that reported by the commission, was introduced. The whole of the testimony was referred by the court to the commission, which reported that:

"This defendant, the Michigan Railroad Commission, has carefully considered the testimony in said cause, and copy of which was transmitted to it, as aforesaid, and in addition thereto and in connection therewith, has made a thorough inspection of all the branch roads of said complainant, the Detroit & Mackinac Railway Company, affected by said orders, the method of transporting forest products thereon and the attending conditions and circumstances incident to the transporting of forest products therefrom to the city of Alpena and intermediate points; and also the transporting of manufactured products from the city of Alpena to various points on the line of the Detroit & Mackinac Railway Company and its connections.

That after a careful consideration of such evidence and the investigations made by this defendant, the Michigan Railroad Commission, in connection therewith, as aforesaid, and the many facts and circumstances, including the character of the service required and the expense incident thereto, it is the opinion and judgment of this defendant, the Michigan Railroad Commission, that the three orders complained of should not be rescinded, altered, modified or amended in any particular."

It also reported:

"That it is the opinion of this defendant, the Michigan Railroad Commission, that the evidence introduced in behalf of complainant, respecting the cost of operation, should not be taken as in any manner conclusive for the reason that it admittedly relates to a subject with respect to which there is no known definite method of computation, which fact clearly appears from the evidence submitted in said cause.

That this defendant, the Michigan Railroad Commission, further reports that it has on file the annual report of the complainant, the Detroit & Mackinac Railway Company, for the year ending June 30, 1910, showing a net earning of (8-7/10%) eight and seven-tenths per cent on the value of its road, as shown by its verified amended bill, which said report was filed with the Michigan Railroad Commission on the 17th day of October, 1910, a certified copy of which is hereto attached and made a part of this report."

The cause proceeded to a decree, which was entered February 11, 1911, which dismissed the bill of complaint with costs. It is in this court upon the appeal of the said complainant railway company and upon the appeal of the intervening complainants from said decree.

Details of the controversy will appear as discussion proceeds. It is sufficient to say here that the railway company published three tariffs, one of them, in effect January 19, 1909, a local freight tariff on logs of all kinds in car loads, minimum 2,500 feet per car, from points north and south of Alpena to Alpena, known as M. R. C. 205, one a local freight tariff on bolts and logs of all kinds between local stations, known as M. R. C. 208, in effect February 20, 1909, and one, a local freight tariff naming switching charges between Alpena and Fletcher's Dam, effective March 14, 1909, which increased the switching charge from $2 to $5. The effect of the orders of the Michigan Railroad Commission is to cancel the tariff M. R. C. 205, to substitute for it M. R. C. 208, with a provision for an additional charge if products of the logs are not shipped out via complainant road, and to decrease the switching charge complained about to $3.50. The orders are here set out. The order of the Michigan Railroad Commission made upon the complaint of Gilchrist, Churchill Lumber Company and Island Mill Lumber Company requires the railway company to publish, file and put in operation a tariff for the transportation of logs in car load lots as follows:

"Ten (10) miles or less, not to exceed one dollars ($1.00) per thousand (1,000) feet;

Over ten (10) miles and not exceeding twenty (20) miles, not to exceed one dollar and thirty-three cents ($1.33) per thousand (1,000) feet;

Over twenty (20) and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand (1,000) feet;

Over thirty (30) and not exceeding fifty (50) miles, not to exceed two dollars ($2.00) per thousand (1,000) feet;

Over fifty (50) and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet;

Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not to be so reshipped, that defendant company are authorized to collect in addition to said rate, fifty cents (50c) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to such shipper the fifty cents (50c) per thousand (1,000) feet collected and

It is further ordered, that the books of both defendant company and complainants (and all other shippers of logs affected by this order) shall show plainly the total of inbound shipments and the reshipment of the manufactured product, and

It is further ordered, that these rates apply to all classes of logs transported by said defendant to said City of Alpena within the distances above set forth."

No minimum load being specified in this order, the commission made the supplemental order, which not only corrects the omission noted but contains a further distinct order made upon a distinct complaint of the Fletcher Paper Company. The said order reads:

"Now therefore, by virtue of the authority vested in us by law, it is hereby ordered, that the said defendant company may charge a minimum rate per car on carload shipments covered by this order the same as now appears in defendant company's tariff, described as M. R. C. No. 208, G. F. D. No. 560 (corrected), now on file with this Commission, to-wit:

Not to exceed ten (10) miles, three dollars ($3.00) per car;

Not to exceed twenty (20) miles, four dollars ($4.00) per car;

Not to exceed thirty (30) miles, five dollars ($5.00) per car;

Not to exceed fifty (50) miles, six dollars ($6.00) per car;

Not to exceed eighty (80) miles, seven dollars ($7.00) per car;

Not to exceed one hundred (100) miles, eight dollars ($8.00) per car;

Not to exceed one hundred and twenty-five (125) miles, nine dollars ($9.00) per car;

Not to exceed one hundred and fifty (150) miles, ten dollars ($10.00) per car; and

It is further ordered, that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad north of Fletcher's Junction the rate to Fletcher's Dam (formerly Broadwell's Dam) shall be the same as the rate to Alpena, and that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad south of Alpena the rate to Fletcher's Dam (formerly Broadwell's Dam) shall be the same as the rate to Alpena."

The other order, made on the complaint of the Fletcher Paper Company, is:

"The above named Fletcher Paper Company having duly filed its complaint with this Commission, charging in substance among other matters that the local freight tariff naming switching charge between Alpena, Mich., and Broadwells, Dam (sometimes called Fletcher's Dam) M. R. C. No. 217, is unreasonable and unjustly discriminatory, and after due notice to all parties concerned, and a hearing having been had thereon and after duly considering the evidence and arguments of counsel, and it appearing to the Commission that the rate named in the local freight tariff, M. R. C. 217, to-wit: $5.00 per car in each direction on all commodities between the City of Alpena and said Broadwell's Dam, is unreasonable and unjustly discriminatory and it appearing to the Commission that $3.50 a car in each direction between said City of Alpena and Broadwell's Dam on all commodities is reasonable and just;

Now, therefore, by virtue of the authority vested in us by law, it is ordered, that said defendant, the Detroit & Mackinac Railway Company, within twenty days from the date of service of a certified copy of this order on it, file, publish, and put in force a rate for switching charge between Alpena, Mich., and Broadwell's Dam, not to exceed $3.50 per car in each direction on all commodities;

Ordered further, that M. R. C. No. 217 heretofore filed and published by said defendant, be cancelled and that said Detroit & Mackinac Railway Company cease and desist after said twenty days from charging more than $3.50 per car in each direction between Alpena, Mich., and Broadwell's Dam for any commodity."

The complaints which were made fairly present for determination the matters disposed of by these orders.

In this court briefs have been filed in behalf of the railway company, in behalf of the intervening complainants, in behalf of the Michigan Railroad Commission by the attorney general, and in behalf of the intervening defendants by other counsel.

The questions debated are (1) whether the branch roads or stems built by the complainant for the Alpena Lumbermen are private logging roads, over which and over the operation of which the Michigan Railroad Commission has no jurisdiction. It is to logs moved out of and over these branches that the specific rates given in M. R. C. No. 205 apply. (2) Whether the rates established by M. R. C. No. 205 are unjust and unduly discriminatory. In this connection it is insisted that the effect of the orders is to diminish the total income of the complainant to a point below what it is fairly entitled to receive. (3) Whether the switching rate of $5 per car to Fletcher's Dam is unreasonable and excessive. (4) Whether the requirement that Fletcher's Dam be made a receiving station for freight is reasonable.

While we have concluded to examine each of these contentions, we do not approve the practice of reviewing in one bill several unrelated orders of the Michigan Railroad Commission.

1. The statute, Act 300, Public Acts of 1909, creating the Michigan Railroad Commission, expressly provides:

"Sec. 3. (a) The term 'common carrier' as used in this act shall be construed to mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers appointed by any court whatsoever who now or may hereafter own, operate, manage or control as a common carrier in this State any railroad or part of any railroad, whether operated by steam, electricity or other motive power, or cars or any other equipment used thereon, or bridges, switches, spurs, tracks, side tracks, terminal facilities, or any docks, wharfs or storage elevators used in connection therewith, or any kind of terminal facilities used or necessary in the transportation of persons or property designated herein, and also all freight depots, yards and grounds used or necessary for the transportation or delivery of any said property and whether the same are owned by said railroad or otherwise; or any express company, car loaning companies, freight or freight line companies and all associations or persons, whether incorporated or otherwise, that shall do business as common carriers upon or over any line of railroads in this State, or any common carrier engaged in the transportation of passengers and property wholly by rail or partly by rail and partly by water."

"(c) The term 'railroad' as used in this act shall be construed to mean all railroads, whether operated by steam, electric or other motive power: Provided, That the provisions of this act shall not apply to any logging or other private railroad not doing business as a common carrier."

"Sec. 14. The commission shall have control over private side tracks in so far as the same are used by common carriers."

Section 14 was amended (Act. No. 139, Public Acts 1911) so as to read:

"The commission shall have control and jurisdiction over all sidetracks, spurs and branches in so far as the same are used or operated by common carriers. No change or discontinuance in the service from, to or on such sidetracks, spurs and branches or abandonment or removal of said sidetracks, spurs or branches, except sidetracks or spurs solely required for the convenient operation of its engines and trains and private industrial sidetracks, shall be made except"

after notice to the commission and to the public.

The meaning of the proviso

"That the provisions of this act shall not apply to any logging or other private railroad not doing business as a common carrier"

is not entirely clear. Much may be said in favor of the proposition that any railroad ought to be permitted to build or operate, temporarily, and by private arrangement, a branch line for the convenience of a patron without subjecting its agreement or its performance thereof to public supervision. Contrariwise, it is apparent that a railroad might in this way greatly prefer an individual, or company, over others similarly situated. The language of the proviso does not suggest the meaning that common carrier railroads are excepted from the jurisdiction of the commission with respect to operations upon and over temporary branch lines, whether logging operations or others. On the contrary, apt language is used to express the idea that private railroads alone are excepted, and not those if they do business as a common carrier. Complainant is not a private railroad. It does business as a common carrier. Its branch lines have been laid and operated for the convenience of timber owners, it is true, but for the convenience of all of them whose timber was so conveniently reached by the branch. Branches have been extended, new branches have been run from those first laid, and the purpose has been to reach with each branch such timber as was offered for transportation. It has published tariffs giving rates to the ends of branches and has filed them with the commission. With a single exception, and that does not apply to an Alpena log owner, it does not appear that its rates for transporting timber from any of its branches are contract rates. What its duties and liabilities in the operation of its branches are or would have been at common law is not very material.

We have no doubt of the power of the legislature to require it to submit those operations to State supervision. The question is whether it has done so, and this question we think must be answered in the affirmative.

2. Were the rates fixed by M. R. C. 205 unreasonable or unduly discriminatory? Are the rates fixed by the commission unreasonable and unjust? These are questions of fact.

The rates established by the Michigan Railroad Commission are lower than any ever demanded or paid by Alpena lumbermen for similar service. They are lower than any ever published by the complainant, if we except its tariff M. R. C. 208. We think it appears that they are lower than any which Alpena lumbermen ever hoped to have established. The rates applied to the business done by the railroad in 1909 would effect a reduction of revenue estimated by defendant intervenors at about $21,000 and by complainant at about $34,000. If complainant is right, the reduction would exceed one-tenth of the total net revenue of the road as reported. Intervening complainants, who do business at stations north of Alpena and south of Cheboygan, one of them having more than $600,000 invested in lumbering and in manufacturing logs and lumber, contend that the rates fixed by the commission favor Alpena lumbermen, excluding all others from the market in which small quantities of logs are offered for sale. Intervening defendants contend that M. R. C. 208 gave an advantage to all log owners except those in Alpena. The importance of the question presented to complainant, to log owners and log buyers, and indirectly to the public, is evident. It is said in the brief for intervening defendants:

"From the standpoint of the Intervening Defendants, there is practically but one question before this Honorable court, and that question briefly is: Do the orders of the Railroad Commission, substituting M. R. C. 208, as modified by imposing a penalty of fifty cents a thousand when the manufactured product is not shipped out by rail; reducing the switching charge between Alpena and Fletcher's Dam from $5.00 to $3.50, and making Fletcher's Dam a point to which pulp wood can be consigned at Alpena rates, result in such depreciation or loss to the complainant railway company as to amount to confiscation.

There is an equally important question which, so far as we know, has never been passed upon by the courts, viz: Can the railway company discriminate in rates and then claim that if rates are equalized on the basis of the lowest, it would result in such a loss of income as to be confiscatory? We believe that the answer to this will be in the negative because the company brought the situation upon itself by unlawful dis-

crimination and because the Commission is always in session, and upon a proper showing, redress could be had."

We apprehend that the words "reasonable and just" in the statute do not mean non-confiscatory, as the word confiscatory is usually defined. The legislature has not fixed the freight rates to be charged by complainant beyond this: It has prohibited and made unlawful every unjust and unreasonable charge. It permits reasonable and just rates to be charged for services performed. It has confined to the Michigan Railroad Commission the power, with the duty, to ascertain, in proper cases, whether a rate is reasonable and just or unreasonable and unjust, and to thereupon make an order in conformity with the facts. The facts being found, it is the legislature which speaks, approvingly or disapprovingly, as the case may be. The important business of the commission with respect to rates is ascertaining facts. Its findings are not conclusive but have the effect of establishing prima facie that the rates considered are reasonable and just and therefore lawful, or are unreasonable and unjust and unlawful. Its orders stand until modified or set aside by it or by the courts. The duty of the courts in the premises is not essentially different from that of the commission. No different conclusion was stated in Mich. Cent. R. Co. vs. Circuit Judge, 156 Mich., 459. It is only after determining that the rate fixed by the commission is unreasonable that the court may set it aside. Presumptively, the findings and orders of the commission are right. If attacked, the complainant has the burden of showing.

"by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be."

The difficulty and perplexity of such an inquiry would deter any one to whom the task was not a duty from pursuing it, in the first instant, and from reviewing a determination once made. It is unfortunate that the courts do not have the assistance which would be derived from a find made by the commission which would distinctly state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable. We notice, in this connection, that in returning the testimony to the circuit court the commission states that its original conclusions are confirmed by a personal examination of the locality in which the service of complainant is performed and by knowledge acquired independent of the testimony produced before it. Manifestly, this court cannot share in knowledge so acquired unless evidence of the facts discov-

ered, or supposed to have been discovered, is in some way brought upon the record.

What has been said indicates, sufficiently perhaps, disapproval of the suggestion that a low discriminating rate for services ought to be imposed as a punishment for publishing such a rate; that a low rate intended by the railroad company to apply to a limited traffic ought to be continued as the rate for all traffic upon the theory that the railroad company is bound not to question the result. The legislative test of a rate has been stated. The legislature has imposed penalties for disobedience of the law. A rate can not be held to be just and reasonable solely because a railroad company has performed services for the indicated charge.

In so far as the original complaints were based upon a comparison of rates to Alpena and rates to Cheboygan, we make no inquiry, for the reason that the said tariff to Cheboygan was canceled by the railway company before the commission made its investigation.

The principal revenue of the railroad has been derived from its freight service. More than one-half of its freight revenue is derived from logs, lumber and other forest products, manufactured and unmanufactured, transported by it. The destination of the greater portion of logs carried is Alpena, a water port, and the greater portion of the logs delivered there are made into lumber, finished and unfinished, and shipped out by water. The quantity of pine, logs or lumber, transported, is negligible. The timber remaining, in any way tributary to the road, is hard wood and hemlock, and at the present rate of removal the large tracts and the most of the standing timber will be marketed in from five to seven years. The country through which the road runs is sparsely settled. Prior to 1893, the Detroit, Bay City & Alpena Railroad extended from a point forty miles north of Bay City, where it connected with the northern division of the Michigan Central Railroad, to the city of Alpena. It was built for, and used, at least principally, as a logging railroad. It was sold at receiver's sale in 1893. It was rehabilitated by the purchaser, found a southern terminus in the city of Bay City, and a northern terminus in the city of Cheboygan, with respect to which termini Alpena is 70 miles south of Cheboygan and 126 miles north of Bay City. Its main line traverses the counties of Bay, Arenac, Alcona, Iosco, Alpena, Presque Isle and Cheboygan, the total population of which counties according to the census of 1910 was 132,420, and, excluding the county of Bay, 74,188. The most considerable settlement reached by the road is the city of Alpena, which by the said census had a population of 12,706. From Alpena north to Cheboygan, and

from Alpena south to East Tawas, the stations on the mail line, and the distances from Alpena, are shown in the following table:

Alpena north to	Cathro	7.6 miles
	Bolton	10.0 "
	Polaski	14.9 "
	Posen	17.6 "
	Metz	22.9 "
	LaRocque	27.3 "
	Bunton	30.3 "
	Millersburg	36.1 "
	Case	39.7 "
	Onaway	44.8 "
	Tower	48.7 "
	Waveland	53.2 "
	Aloha	62.9 "
	Inverness	67.5 "
	Cheboygan	71.6 "
south to	Ossineke	13.2 "
	Black River	22.9 "
	Alcona	27.2 "
	Sturgeon Point	30.4 "
	Harrisville	33.8 "
	Greenbush	39.4 "
	Lincoln Junction	46.1 "
	AuSable	51.6 "
	Kunze Siding	58.8 "
	Tawas Beach	62.8 "
	East Tawas	64.8 "

To reach timber not immediately upon the line of the road, it has built stems or spurs running from its main line into the timber, and in many cases from these stems or extensions so built numerous shorter branches have been laid to reach bodies of timber and facilitate the movement of forest products. Along many of these branches the timber has been exhausted, and they are no longer operated by the railway company, which has taken up its iron and, as it was available, relaid it upon other stems or branches of the road. The branches which are now, or were until recently, operated by it "for freight traffic only," and the mileage of each are:

"BRANCHES OPERATED FOR FREIGHT TRAFFIC ONLY

Bloom Branch

Waveland to Bloom Branch Junction	1.8 miles
Bloom Branch Junction to end of rails	1.5 "

Cleveland Branch

Tower to end of rails	11.5	"
Tower to Wolverine Branch Junction	6.5	"
Wolverine Branch		
Cleveland Branch Junction to end of rails	1.0	"
Tower, via Cleveland Branch to end of rails	7.5	"
Indian River Branch		
Tower to end of rails	2.2	"
Tower to LeGrand	8.1	"
Black Lake Branch		
Black Lake Junction, Black Lake	5.2	"
Onaway to Black Lake Junction	0.6	"
Tubbs Branch		
Millerburg to Tubbs Branch Junction	4.5	"
Tubbs Branch Junction to end of rails	5.0	"
Hurst Branch		
LaRocque to Hurst	5.1	"
LaRocque via Hurst to end of rails	10.0	"
Kimball Branch		
Polaski to end of rails	5.6	"
Gates Branch		
South Branch to end of rails	8.4	"
Prescott-Miller Branch		
Rose City to end of rails	9.4	"

Three, and perhaps more, of the stems of railroad which have been so built from the main line thereof have been constructed at the expense of, and they are owned by, the Detroit & Mackinac Railway Company. It has been the custom, however, to build the smaller branches and some of the stems with which such smaller branches connect by arrangement between the railway company and the owners of timber. In this respect the arrangements which have been made vary somewhat but usually the arrangement was that the timber owner furnished—acquired, by lease or otherwise, if he did not own—the right of way, graded the road bed, and sometimes furnished the ties, and the railway company furnished and laid the iron and operated the road. It was not an uncommon thing for the timber owner, who so joined in constructing the stem or branch, to charge other owners of timber tributary thereto a certain rate or price per thousand feet for all forest products which the railway company moved for such other land owner over the branches and stems so acquired and so operated. The equipment—that is, cars and locomotives—have always been furnished by the railway company. Prior to 1907, the rates charged by the railway company for moving forest products which came to its main line from the tributary stems or branches were, in many cases, agreed upon by the railway company and the timber owners and were not uniform,

often two or three different rates were made for moving forest products from the same stem or branch to the city of Alpena. There was a difference in the rate charged for moving hard wood and that charged for moving hemlock, after hemlock came to be a merchantable commodity, a thousand feet of hemlock weighing from 2,500 to 3,000 pounds, depending upon how dry it is, and a thousand feet of hard wood, like maple, depending upon the same condition, weighing from 4,000 to 4,500 pounds. To secure the lesser rate on hemlock, it was the rule to bank or skid and load hemlock separate from hard wood, because if any considerable portion of the car load of logs was hard wood the rate charged for transporting it was the hard wood and higher rate. The Alpena log owners desired to have the railway company make a rate for transporting logs which would permit the loading of logs without separating the hemlock from the hard wood. As tersely put by some of them, it was desired to have a tariff under which a log would be a log. In February, 1907, one of the intervening defendants, the Churchill Lumber Company, addressed to the railway company a letter, which is here set out as indicative of the desires of that lumber company and, to some extent at least, of other Alpena log owners at that time:

"Alpena, Michigan, February 12, 1907. Mr. T. G. Winnett, General Freight & Passenger Agent, D. & M. Railroad, Bay City, Michigan. Dear Sir:—As per conversation with the writer in your office on the 8th inst., relative to naming us a rate for hauling mixed logs, and with a view of your naming us a rate based on our present rate that will be fair to both of us, we submit you the following figures as to our holdings, based on estimates of our land-looker, Mr. W. S. Tubbs, and on which we have purchased the timber. On his estimates, we now own fifty million feet adjacent to your road, of which sixty per cent is hemlock and forty percent is hardwood. Of this amount 35 millions is located from Larocque to Alpena, and fifteen millions above Larocque. In the 35 millions is included about one million feet that will come to your tracks on the Hurst Branch, and at the Water Tank Siding at Larocque. The balance is all from Larocque station to Alpena. The 15 millions coming to your tracks above Larocque will be from Bunton's Crossing and above, but mostly from the Tubbs Branch. Our present rate from Larocque to Alpena is $2.50 per thousand on hemlock and $3.25 per thousand on hardwood. Based on our holdings of sixty per cent hemlock and forty per cent hardwood, the average rate would be $2.80 per thousand. Our present rate from points above Larocque to Alpena is $2.75 per thousand on hemlock

and $3.75 per thousand on hardwood. Based on our holdings of sixty per cent hemlock and forty per cent hardwood, the average would be $3.15 per thousand. On this showing we will ask you to make us a rate on mixed logs from Larocque to Alpena, including the Hurst Branch, and the Water Tank Siding at Larocque, of $2.75 per thousand, and from the Water Tank Siding at Larocque, and above to Alpena of $3.00 per thousand. As we explained to your Mr. Luce and yourself, we believe a rate on mixed logs would be advantageous both to your company and ourselves, not as a financial loss or gain to either of us, so far as the rate is concerned, but it would facilitate the loading and handling of the cars, as it is impossible at times to load all cars placed for us either with all hemlock or all hardwood, and this necessitates an extra switch on your part and a loss of time on our part.

Trusting for an early and favorable consideration of our request, we remain, Yours very truly, Churchill Lumber Company, F. A. Kimball, Secretary and General Manager."

Later, in November of the same year, a conference was had between agents of the railway company and Alpena log owners or their representatives. Just what was said, what demands or requests were made during the conference, is not clear, those who were present and who gave testimony being to some extent in disagreement. The railway company, claiming that in so doing it met the special request indicated by the foregoing letter and the general request expressed by the Alpena log owners, issued and published the local freight tariff on logs of all kinds in car loads, minimum 2,500 feet per car, from points north and south of Alpena to Alpena, known as M. R. C. 205. The railway company also issued the local freight tariff M. R. C. 208. Both were in effect when the complaints were made to the Michigan Railroad Commission. These tariffs are here set out:

"M. R. C. No. 205 G. F. D. 555.
Cancels M. R. C. No. 198 Cancels G. F. D. No. 548.
Advance Reduction.

DETROIT & MACKINAC RAILWAY COMPANY

'Turtle Route'

Local Freight Tariff on Logs (All kinds, carloads) Minimum 2500 feet per car to Alpena, Mich.

From		Rates per Thousand feet
Alcona	Mich.	$3.00
Aloha	"	3.25
Au Sable	"	3.25

Black Lake Quarry (Black Lake Branch)	"	3.25
Black River	"	3.00
Bolton	"	3.00
Bunton	"	3.00
Case	"	3.25
Cathro	"	3.00
Cheboygan	"	3.25
*Clark's Mill (Cleveland Branch)	"	3.25
*End of Kimbrall Branch	"	3.00
*End of Wolverine Branch	"	3.25
*Gilchrist Spur (Laugh Branch)	"	3.25
Greenbush	"	3.25
Gustin	"	3.25
Handy	"	3.25
Harrisville	"	3.00
*Hurst (Hurst Branch)	"	3.00
LaRocque	"	3.00
*Le Grand	"	3.25
Lincoln	"	3.25
*Martindale Spur (Tubbs Branch)	"	3.00
Metz	"	3.00
Mikado	"	3.25
Millersburg	"	3.25
*Mill Spur (Indian River Branch)	"	3.25
Onaway	"	3.25
Ossineke	"	3.00
*Paxton	"	2.50
Polaski	"	3.00
Posen	"	3.00
Tower	"	3.25
Waveland	"	3.25

The rates from intermediate points will be the same as the rates from the next more distant point from which rates are named.

A refund of 50 cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway.

*No regular train service. Shipments from these points handled at our convenience only.

Issued, Jan. 20, 1909. Effective, Feb. 1, 1909."

"M. R. C. No. 208 (Corrected) G.F.D. No. 560 (Corrected)

Cancels M. R. C. No. 2. Cancels G. F. D. No. 104.

Re-Issue—Reduction

DETROIT & MACKINAC RAILWAY COMPANY

'Turtle Route'

Local Freight Tariff on Bolts and Logs, all kinds, minimum weight on Bolts 40,000 pounds per car between local stations on Detroit & Mackinac Railway.

Distance (note) Not to Exceed	Rate on Bolts in cents 100 lbs.	Rate on Logs per 1,000 feet	Minimum Charge per car on logs
10 miles	3-4	$1.00	$3.00
20 miles	1	1.33	4.00
30 miles	1 1-4	1.67	5.00
50 miles	1 1-2	2.00	6.00
80 miles	1 3-4	2.33	7.00
100 miles	2	2.67	8.00
125 miles	2 1-4	3.00	9.00
150 miles	2 1-2	3.33	10.00

Note.—In arriving at correct distances this tariff is governed by Local Distance Table G. F. D. No. 565, M. R. C. No. 211 and supplements thereto and re-issues thereof.

The rates named herein apply only when the manufactured product is to be reshipped via Detroit & Mackinac Ry. and in the absence of tariffs naming specific rates.

Issued February 8, 1909. Taking effect February 20, 1909. Issued to supersede original tariff by authority Michigan Railroad Commission, file 11295, D. & M., Feb. 11, 1909."

The slightest study of these tariffs in connection with the statement of mileage heretofore made will disclose the considerable difference in the published rates. Take, for example, LaRocque, which would be reckoned as 30 miles distant from Alpena. Under M. R. C. 208, the minimum tariff for moving a car of logs to Alpena is $5, under M. R. C. 205, it is $7.50. If the logs transported were shipped out as lumber via complainant's road, the refund would be, according to the tariff, 50 cents per thousand, or $1.25.

In the business done by the complainant in the year 1909, about 70 per cent of the total earnings was received from freight. About 52 per cent of the total freight revenue came from transporting logs, lumber and forest products. All logs hauled to Alpena lumbermen were from points north of Alpena and south of Cheboygan. The accompanying table shows the number of cars of log shipments to Alpena for the year 1909, the point of shipment, the miles covered, the scale of the logs. The total number of feet is admitted by intervening defendants to be correct.

From	No. Cars	Miles	Feet
Black River	29	22.9	83,420

Hillman	17	23.9	53,988
Paxton	136	9.	447,048
Daggert's Xing	11	10.5	33,870
Bolton	238	11.5	795,040
Cathro	104	9.2	326,810
Kimball Br.	985	19.9	3,004,720
Crawfords Spur	389	15.	1,178,605
Buzza Spur	45	18.	136,140
Polaski	169	16.	531,730
Posen	296	19.	949,684
Nowicki	289	22.9	954,200
Metz	401	24.	1,292,310
Cedar Spur	171	22.	561,630
So. Rogers	224	25.6	731,030
LaRocque	1,126	28.8	2,616,262
Hurst Br.	168	33.8	546,510
Millersburg	9	37.6	27,270
Bunton	1	31.9	2,750
Case	4	42.1	11,220
Onaway	482	46.4	1,615,142
Black Lake Br.	10	52.	35,615
Tubbs Br.	867	47.1	2,755,100
Pritchard Sp.	216	43.	637,210
Gilchrist Br.	861	55.2	2,812,572
Indian Riv. Ex.	96		298,950
Pollack Sp.	244	55.2	796,730
Bloom Br.	573	56.5	1,845,030
Laugh Br.	149	55.5	475,945
Nicholson Sp.	7		22,250
Wolverine Br.	282	64.	862,700
Cleveland Br.	164	61.8	525,425
Tower	22	50.3	66,825
Aloha	5	64.	15,230
Cheboygan	11	73.7	34,240
	8,801		28,083,201

It is charged in the bill of complaint, under a videlicit, that the property of the complainant, including investments in logging spurs and branches, is of the value of $4,585,000, that the cost of reproducing the same, less depreciation from age, wear, etc., would equal that sum; that the total revenue for the year ending June 30, 1909, was $1,164,848.86, its operating and maintenance expenses, including taxes, were $881,389.52, leaving a net profit of $283,459.34, a little less than 6 1/5 per cent; that, if the orders of the Michigan Railroad Commission are enforced, the earning capacity of the capital investment will be seriously impaired and reduced below the

reasonable and legitimate earnings of similar railroad property in the State of Michigan and in the United States of America, and to less than it is entitled to earn before it can be required to perform any particular service for less than the cost thereof. It is charged that the effect of the tariff fixed by the commission will be to require it to perform the service indicated at less than cost and a fair profit.

The testimony of the general manager of the railway company is that in his opinion the physical property of the road can be reproduced in its present condition for a sum greater than $5,000,000 and less than $6,000,000, and that the road is worth as situated about $8,000,000.

Its common stock is	$2,000,000
preferred stock,	950,000
first lien bonds,	1,500,000
mortgage bonds,	1,600,000
	$6,050,000

In the treasury of the company are $800,000 of its bonds, said to represent actual betterments of the road which have been paid for, for which betterments the bonds might have been sold but were not. It appears that the outstanding bonds did not sell at par, that considerable permanent improvements have been made out of earnings, and that the cost of the branches, or of some of them, was charged to operating expenses. The property is valued for taxation by the State assessors at $4,485,000.

For the purpose of decision, the learned circuit judge assumed the value of the road to be $5,000,000. The basis of a calculation such as the Michigan Railroad Commission was bound to make has been many times held to be the fair value of the property as a producing factor, not necessarily its cost nor the amount of money expended. 4 Elliott on Railroads, section 1684A.

"The fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return

upon the value of that which it employs for the public convenience." Smyth vs. Ames, 169 U. S., 466, 546, 547.

See, also, 2 Hutchinson on Carriers, section 583.

We have stated the testimony upon the subject. We are of the opinion that with the burden resting upon complainant it should have presented other evidence, from which the court could determine, with reasonable certainty, the value of property. If the value of the property is to rest upon opinion, the opinion of the commission is quite as valuable as that of the court. The evidence before us entitled to the greatest weight is that of the assessed value of the property and the averments in the sworn bill of complaint. Evidence of a greater value, if it exists, is available to complainant.

Complainant has expended considerable sums in building and maintaining the branch roads. It is expensive to keep them open in the winter. The taxes exacted from the railroads, including complainant, have been materially increased in late years. Complainant presented an estimate of the daily expense of handling 8 cars of logs daily for an intervening defendant during the month of April, 1910, between Gilchrist Branch and Alpena, which is said to be a haul of 61 miles. That it is an impossibility to find the actual cost of such service is admitted.

Without setting out the result of the examination which we have made of this estimate, our finding is that some of the items of expense are manifestly excessive.

In the last analysis of the testimony, the facts which appear to have the largest value for complainant are (1) that the service rendered to Alpena lumbermen in accordance with M. R. C. 205 is in some respects special, since all or nearly all of the logs transported for them come out of the branches, (2) the timber, in the past and now the source of a large revenue, will in a few years be exhausted, and, unlike agricultural and manufacturing products, it cannot be reproduced, (3) by far the largest portion of the logs carried to Alpena are made into lumber and shipped away by water, whereas at one or more of the points to which the lower rates apply, the considerable manufacture of logs into commodities other than lumber is carried on, prolonging the life of all business dependent upon the forest products, increasing the size and stability of the communities, and in consequence, augmenting the revenue of the railroad which must bring to the communities what they need and cannot themselves supply, (4) in the past it has received for a service such as that to which M. R. C. 205 applies a rate equal to or slightly less than the tariff rate, (5) the service now rendered by complainant to Alpena lumbermen is rendered at somewhat greater cost to complainant than for-

merly, owing to the manner of loading and delivery of logs and a generally increased cost of operating the road, (6) the large diminution of the earnings of the road under the commission tariff, (7) the situation and prospects of the railroad without feeders (except a single short road), with a local business, with short hauls. The reasonableness of M. R. C. 205 is supported by experience, by which is meant the exacting by the railroad and payment by shippers, in the past, of a corresponding tariff. It is supported by the written request of one of the intervening defendants, hereinbefore set out, in which a rate is specified. It is supported by the fact that the branch lines are built and when they were built it must have been mutually contemplated by the railroad company and the timber owners that in the absence of any considerable change in circumstances rates corresponding to those then existing would be demanded and paid. The railway company has had no opportunity to consent, or refuse, to build and operate branch lines for the returns promised under the commission tariff. Other considerations modify some of those just stated. The complainant had no competitor for the business offered. It operated the branch lines somewhat at its convenience. The cutting of the timber necessarily preceded agriculture and a permanent community. The Michigan Central Railroad, under identical conditions as to branch lines, has in force a tariff of rates lower than those given in M. R. C. 208. The country tributary to the road has other natural resources, the development of which is furnishing and will continue to furnish a large tonnage of freight, of a low class. But the most convincing evidence of the unreasonableness of the canceled tariff is found in M. R. C. 208 and the operations thereunder. Precisely the same service, length of haul excepted, is rendered by complainant under these tariffs. Under each, logs are brought in from the branch lines and delivered at destination on the main line. The quantity transported under the lesser rate is much smaller than that transported under the greater rate, but it is not shown that the lesser rate is unremunerative. The only reason given for the evident discrimination against Alpena (or in favor of interior points) which we think has force is the one that from other stations than Alpena all manufactured product must be transported by complainant. This condition is met by a differential fixed by complainant and continued by the commission. The Michigan Railroad Commission found that the rates charged for the transportation of logs in car load lots to the city of Alpena are unjust, unreasonable and excessive. It is said in Interstate Comm.: Comm. vs. Chicago G. W. Ry. Co., 209 U. S., 108, 118:

"It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in Int. Com. Com. vs. Ala. Mid. R. R. Co., 168 U. S., 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in Int. Com. Com. vs. B. & O. R. R. Co., 43 Fed. Rep., 37, 50:

'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.'

It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the Interstate Commerce Act—Armour Packing Co. vs. The United States, ante, p. 56, and also that in fixing their own rates they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. Int. Com. Com. vs. B. & O. R. R. Co., 145 U S., 263; T. & P. Ry. Co. vs. Int. Com. Com., 162 U. S. 197; Int. Com. Com. vs. Ala. Mid. Ry. Co., supra; L. & N. R. R. C. vs. Behlmer, 175 U. S., 648; East Tenn. &c. Ry. Co. vs. Int. Com. Com., 181 U. S., 1; Int. Com. Com. vs. L. & N. R. R. Co., 190 U. S., 273.

It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers."

This doctrine may be approved without requiring us to overturn the action of the railroad commission. The Alpena shippers of logs and the Onaway shippers of logs are similarly circumstanced with respect to securing the delivery of logs at the respective destinations. It is conceded that the railway company can and should make a lower rate for the service rendered to the shippers when the product of the logs is reshipped by rail. Aside from this consideration, the shippers at each of these points stand, as to each other, upon the same footing, demanding, and receiving, the same service. The differential adopted by the railway company is its estimate of the value to it of the reshipment of manufactured logs. When the differential is applied, there is still a much higher rate on logs to Alpena than to Onaway, mileage being considered. We have considered whether the remaining difference may be treated as a further differential in favor of the interior communities, warranted not by the difference in cost of service rendered but by the necessity for encouraging local manufacturers, stable communities, and securing a constant revenue for the railroad. The tariff M. R. C. 208 is not framed in accordance with such a theory, whatever its results would be. It is doubtful if a mileage basis tariff could be so framed. As has been stated, it is not shown that the lower rate is not remunerative. The complainant has not shown, to our satisfaction, that the finding that the specific rates for logs in car loads to Alpena are per se unreasonable and excessive ought to be disturbed.

We come now to the point most dwelt upon in argument, namely, that the result of the action of the commission will be such a reduction of the earnings of complainant that it will not receive a fair return upon the value of its property devoted to the public convenience.

Notwithstanding the elaborate treatment which counsel have given the matter, it occurs to us to inquire whether the point can be determined. It is presented by counsel, but does the record purport to contain what should be examined before arriving at a conclusion? The income of complainant derived under the tariff in question is a very considerable portion of its total income. The income will be materially reduced if the order of the commission is sustained and all other tariffs are maintained. But complainant has numerous tariffs. Are some of them too low? Are all of them just and reasonable? It may be answered that they are not questioned by defendants. This is not a sufficient answer, in view of the burden resting upon complainant. The canceled tariff has been found to be unjust and unreasonable. We are unable to say that the finding was wrong. The substituted tariff is prima facie just and

reasonable. We are unable to say that it is not. Should other rates be increased? Steenerson vs. Ry Co., 69 Minn., 353. There is testimony showing a proposed general tariff, increasing rates, to take effect in August, 1910, but suspended by an agreement among Michigan carriers to suspend class rate tariffs until November 1, 1910. Complainant computes that under the old rates it would have received for logs transported to Alpena, in 1909, $85,864, while under the commission rates it would receive for the same service $51,132.45. It therefore asserts, that its loss in revenue will be $34,731.65. In this computation the commission's minimum rate is applied and contrasted with M. R. C. 205 at its maximum. Under M. R. C. 205 a refund of 50 cents per thousand feet is provided for when the product of the logs is reshipped by rail and the commission's minimum is increased by the same amount if the product is not shipped out by rail. It is manifest, therefore, that the loss in revenue will not be $34,731.65. The computation includes logs shipped to Fletcher Paper Company. All of its paper is shipped out by rail. In the year 1909, other products of logs shipped out of Alpena by rail was equal to about 11,000,000 feet, which is more than 40 per cent of the 28,083,201 feet shipped in. An accurate computation is impossible. The circuit judge roughly estimated that 20 per cent of the logs shipped in to Alpena were shipped out by rail, the remainder by water, and the net loss $30,000. The testimony given in terms of percentage most favorable to this finding is that from 75 to 80 per cent was shipped by water. Computing the difference in revenue upon the basis that 41 per cent of logs was shipped out by rail, the difference between M. R. C 205 and the commission rate would be $19,608.23. If all logs into Alpena in 1909 had been reshipped by rail, the revenue derived by complainant would have been $65,174.05. Whatever the exact result may be, it is denominated by complainant a direct loss as distinguished from the indirect loss arising from loss of business at the points favored by M. R. C. 208. The general manager of complainant expressed the opinion that the putting into effect of the order of the commission "would hurt the railroad to an extent of over 10 per cent of its gross earnings." It seems probable that if the commission's order had been in effect during 1909, the resulting loss of revenue would have been from $21,000 to $25,000. The net earnings of the road for 1909 were $283,459.34, and for 1910 were $296,586.45, according to the annual reports made by the complainant. A loss of revenue of $25,000 each year would have reduced net earnings to $258,459.34 in 1909, and to $270,586.45 in 1910. Valuing the property invested at $4,585,000, a 6 per cent return thereon would be $275,100.

Ought we to assume that the net earnings of the road for the purposes of this case are those reported and above set out? It appears that a sum equal to nearly one-half of the net earnings reported was in each of the years 1909 and 1910, charged off for depreciation. Should such sums have been so charged? Assuming that complainant is entitled to maintain tariffs which will yield a net return of six per cent per annum, or more, upon the value of the property it devotes to the public use and convenience, has it fairly shown that it does not now get such a return? We are not disposed to enter upon a consideration of the question whether complainant is entitled to a net return of 5 or 6 or 7 per cent upon its property; we are disposed to make it clear, with what may seem needless prolixity, that the margin between what complainant claims and what it admittedly receives is a small one, increasing and diminishing, as we indulge or do not indulge assumptions, and that the enforcement of an order reasonable in itself will not be forbidden except upon clear proof that the result is and must be to deprive complainant of a fair return upon the value of its property.

3, 4. It appears that the complainant charges in Alpena three, four and five dollars per car for switching. Under what circumstances of time, place and probable expense these various charges are imposed, we are not informed. We are not satisfied with—are very doubtful concerning—the estimate presented of the actual cost of switching cars to Fletcher's Dam. We repeat that the rates made by the commission are prima facie reasonable and just. They must be shown to be unjust and unreasonable. Indulging the statute presumption, we are unwilling to hold that the rate prescribed by the commission is unreasonable. And with respect to the freight rate and delivery of cars to Fletcher's Dam, we express the affirmative opinion that the order made by the commission is, in view of all the circumstances, a just one.

The decree of the court below is affirmed, but without prejudice to the right of the railway company to move the commission for a modification of its rules, as its experience and the facts coming to its knowledge may appear to warrant.

Justice Blair, being ill, takes no part in this decision.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 29th day of July in the year of our Lord one thousand nine hundred and twelve.

Present: the Honorable Joseph B. Moore, Chief Justice. Joseph H. Steere, Aaron V. McAlvay, Flavius L. Brooke, John W. Stone, Russel C. Ostrander, Associate Justices.

The Detroit & Mackinac Railway Company,
Complainant and appellant,

vs.

Michigan Railroad Commission,
Defendant and appellee.
The Fletcher Paper Company, et al.,
Intervening Defendants.

This cause having been brought to this court by appeal from the Circuit Court for the County of Wayne, in Chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the court, that the decree of the Circuit Court for the County of Wayne, in Chancery, be and the same is hereby in all things affirmed. And it is further ordered adjudged and decreed that the defendants do recover of and from the complainant and appellant, their costs, to be taxed.

State of Michigan, ss:

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of a decree entered in said court in said cause; that I have compared the same with the original and that it is a true transcript therefrom, and the whole of said original decree.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 10th day of September in the year of our Lord one thousand nine hundred and twelve.

(Seal)

Chas. C. Hopkins,
Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DISTRICT.

IN EQUITY.

Detroit & Mackinac Railway Co.,

Complainant,

vs.

Michigan Railroad Commission, Frank W. Gilchrist, Island Mill Lumber Co., Churchill Lumber Co., and Fletcher Paper Company,

Defendants.

State and Eastern District of Michigan, County of Bay, ss:

Frank W. Fletcher, of Alpena, in said state and district, being duly sworn, deposes and says that he is President of the Fletcher Paper Company, one of the defendants in the above entitled cause, and has charge of the litigations for said Fletcher Paper Company.

Deponent further says that he was personally present on August 10, 1912, when an application was made by the complainant in the above entitled cause, through Mr. Fred A. Baker, its counsel, to the Honorable William R. Day, one of the justices of the Supreme Court of the United States, for an order authorizing the issuance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan, to review the decision of said court in a certain action commenced and prosecuted in the Circuit Court for the County of Wayne, in Chancery, by the above named complainant, against the Michigan Railroad Commission, as defendant, and Frank W. Gilchrist, the Island Mill Lumber Company, Churchill Lumber Company, and Fletcher Paper Company as intervening defendants, in which a decree was rendered in favor of the said defendant and intervening defendants, sustaining certain orders of the Michigan Railroad Commission, and which said case was subsequently removed by appeal by said complainant to the Supreme Court of the State of Michigan, where the said decree of said Circuit Court was affirmed.

Deponent further says that the said Justice Day refused such application on the ground that the opinion of the Supreme Court of Michigan disclosed no Federal question justifying the issuance of such writ.

Deponent further says that upon the statement, in substance, of Mr. Baker, solicitor for said complainant, that in

view of such refusal, he proposed to file a bill of complaint in this court, of the nature of the bill of complaint heretofore filed, the said Justice stated in answer thereto, that such bill of complaint would not be entertained because the said Railway Company had already elected to prosecute its action in the state court.

Deponent further says that during the conference, a reference was made by said Baker to a certain case which he referred to as the Virginia case. The question was then asked, in substance, if all the testimony was before the Supreme Court, and Justice Day was assured by counsel that under the practice of Michigan, in chancery, cases, all the testimony was removed to the Supreme Court. Thereupon, Justice Day announced that the Virginia case, so-called, was not at all applicable to the case heard by him that morning, for the reason, in substance, and among other reasons, that all the testimony in the case presented to him had been before the court, and a full judicial determination reached thereon.

Frank W. Fletcher.

Subscribed and sworn to before me this 11th day of September, 1912.

Jessie Thompson,
Notary Public, Bay County, Mich.

My Commission expires April 4, 1915.

ANSWER OF MICHIGAN RAILROAD COMMISSION ON APPLICATION FOR INJUNCTION.

(Filed Sept. 27, 1912.)

No. 5523.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DISTRICT.

IN EQUITY.

Detroit & Mackinac Railway Co.,

Complainant,

vs.

Michigan Railroad Commission, et al.,

Defendants.

The answer of defendant Michigan Railroad Commission to application of complainant for a temporary injunction.

The defendant Michigan Railroad Commission hereby appears especially (without submitting itself generally to the jurisdiction of the court or waiving any rights or remedies) and say that the said complainant is not entitled to a temporary injunction against this or any of said defendants for the following reasons:

1. That the said complainant has not in and by the said bill made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for.

2. That the matters and things complained of in said bill are res adjudicata.

3. That the said court is without jurisdiction to grant the relief or any part thereof demanded in and by said bill.

4. That the bill of complaint upon its face shows that it is filed for the sole purpose of again litigating a cause of action heretofore fully determined between the same parties upon original bill and answer, in the Circuit Court for the County of Wayne, in Chancery, State of Michigan, and upon appeal therefrom to the Supreme Court of the State of Michigan, whereby the relief sought by complainant is barred in this court and complainant's rights in respect thereto adjudicated and concluded in said courts of the State of Michigan.

5. The complainant's remedy, if any exists, is by writ of error under section 709 of the Revised Statutes of the United States.

6. That the said bill of complaint does not state a cause of action arising under the Constitution and Laws of the United States, and state no other ground of federal jurisdiction.

7. That the ultimate relief sought by said bill of complaint is the issuance of an injunction in violation of the provisions of section 720 of the revised statutes of the United States.

This defendant also desires to make the answer of the Fletcher Paper Company, Frank W. Gilchrist, Churchill Lumber Company, and Island Mill Lumber Company, other defendants mentioned in said cause, to the application for an injunction, a part of its answer, together with the affidavit of Hezekiah M. Gillett and Frank W. Fletcher thereto attached, and the printed records and briefs filed in the Supreme Court of the State of Michigan on the appeal of said complainant from the decree of the Circuit Court for the County of Wayne, in Chancery, to which reference is made in said bill.

Michigan Railroad Commission,
By Roger I. Wykes,
Attorney General of the State of Michigan,
Charles W. McGill,
Assistant Attorney General of the State of Michigan,
Of Counsel for said defendant.

MOTION FOR PRELIMINARY INJUNCTION ARGUED AND SUBMITTED.

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit in said District, on Friday the twenty-seventh day of September in the year of our Lord one thousand nine hundred and twelve.

Present: The Honorable Loyal E. Knappen, the Honorable Arthur C. Denison, Circuit Judges. The Honorable Clarence W. Session, District Judge Sitting by Designation.

Detroit & Mackinac Railway Company,
vs.
Michigan Railroad Commission, Cassius L. Glasgow, George W. Dickinson, Lawton T. Hemans, Frank W. Gilchrist, The Churchill Lumber Company, The Island Mill Company and The Fletcher Paper Company.

In this cause the application for Interlocutory Injunction having been duly noticed and coming on for hearing on this day, is argued by counsel for respective parties and submitted to the court for Judgment.

OPINION ON MOTION FOR PRELIMINARY INJUNCTION.

(Filed March 22nd, 1913.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 5523.

IN EQUITY.

The Detroit & Mackinac Railroad Company,
Complainant,

vs.

Michigan Railroad Commission et al.,
Defendants.

Before Knappen and Denison, Circuit Judges, and Tuttle, District Judge.

Per Curiam:

Complainant owns and operates a railroad running both north and south from Alpena. All questions here involved are with regard to traffic moving wholly within the state. The Railroad Company, pursuant to the Michigan Statute and the regulations of the Michigan Railroad Commission, made and published a local tariff known as M. R. C. (Michigan Railroad Commission) 205, giving rates upon logs from specified stations to Alpena. It later so made and published a mileage tariff, known as M. R. C. 208, giving mileage rates on logs, applicable "only when the manufactured product is to be reshipped via the Detroit & Mackinac Railway, and in the absence of tariffs naming specific rates." If the mileage basis, specified in tariff M. R. C. 208, was applied to the local rates fixed by tariff M. R. C. 205, they would be greatly reduced. Certain shippers complained to the Commission that the rates in 205 were unreasonable, and that this tariff, in connection with 208, operated as a discrimination against them, and favored other shippers who were so situated as to take advantage of 208. Due notice was given, other shippers intervened on both sides of the controversy, proofs were

taken, and a hearing had before the Commission. It found that the complaint was well based, and that the rates in tariff 205 were unjust, unreasonable and excessive; and it ordered that the Railway Company should make and publish a new local tariff with specified lower rates. This required new tariff was made up mainly, if not wholly, by applying the mileage rate fixed in tariff 208. The Commission also made a further order, which need not be described, because fully within the rule which we are to consider.

The Michigan Railroad Commission Act (No. 300, Pub. Acts Mich., 1909), which undertakes, quoting from its title, to "define and regulate common carriers and the receiving, transportation and delivery of persons and property, prevent imposition, unreasonable rates, prevent unjust discrimination, insure adequate service, create the Michigan Railroad Commission, etc.", contains a variety of provisions of which those thought to be here important are quoted in the margin.*

*Sec. 26(a) Any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within thirty days from the issuance of such order and notice thereof commence an action in the Circuit Court in chancery against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates fares, charges, classifications, joint rate or rates fixed are unlawful or unreasonable, or that any such regulation, practice or service, fixed in such order is unreasonable; in which suit the commission shall be served with a subpoena and a copy of the complaint. The commission shall file its answer, and on leave of court any interested party may file an answer to said complaint. Upon the filing of the answer of the commission said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the Circuit Court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and the Circuit Courts in chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law;

(b) No injunction shall issue suspending or staying any order of the commission, except upon application to the

Circuit Court in chancery or to the judge thereof, notice to the commission having been given and hearing having been had thereon;

(c) If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence, the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order;

(d) Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal to the Supreme Court, which appeal shall be governed by the statutes governing chancery appeals. When the appeal is taken the case shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or if no term is then pending, shall take precedence of cases of a different nature except criminal cases at the next term of the Supreme Court;

(e) In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be.

Sec. 27 (a) In all actions and proceedings in court arising under this act all such process shall be served and the practice and rules of evidence shall be the same as in actions in equity, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil process shall execute any process isued under the provisions of this act, and shall receive such compensation therefor as may be prescribed by law for similar services.

Thereupon, the Railway Company filed, in the Circuit Court for the County of Wayne, in chancery, its bill of complaint reciting the facts above stated, and alleging the cost of its road, cost of operation and value of the products shipped; that the local tariff under the attack was, in all respects, just and fair; that the special mileage tariff (M. R. C. 208) was justified by special conditions stated; and that the two tariffs did not operate to cause any improper discrimination. It also alleges that the orders in question were against the just rights of complainant, and were unjust, unreasonable and illegal, and if put into execution will financially cripple the complainant and interfere with the just and legal operation of its railroad; that no effort was made by the Commission to ascertain the cost of the carriage involved; that portions of the hauls covered by the order are upon logging branches which are not railroads within the jurisdiction of the Commission; that the rates in M. R. C. 205 do not exceed the actual cost of carriage with a reasonable profit added; that complainant cannot be required to perform such services for less than cost and a reasonable profit; and that the orders of the commission operate to compel service for less than such cost and a fair profit, and are in conflict with the due process of law clause of the Fourteenth Amendment to the Federal Constitution. It further shows that if the orders are enforced, its earning capacity will be reduced below the minimum rate of return on its investment, and its capital will be impaired and its property will be taken; and again invokes the protection of the fourteenth amendment. It thereupon prays (1) that the logging spurs and branches be declared not subject to regulation by the Commission; (2) that the tariff rates of M. R. C. 205 may be decreed to be reasonable and just, and those fixed by the Commission to be unreasonable and unjust; (3) that the rates fixed by the Commission may be decreed to be confiscatory and a deprivation of property without due process of law; and (4) that the rates fixed by the Commission may be declared to be in conflict with the Michigan Constitution; and prays for general relief.

The Commissoin and intervening shippers answered, a large amount of evidence was taken, and the Circuit Judge certified the evidence to the Commission. It made a report to the court, adhering to its former opinion, and stating the reasons therefor. The Circuit Judge filed an elaborate opinion, pursuant to which the bill was dismissed. The complainants appealed to the Supreme Court of Michigan, the case was there heard like any other appeal in chancery, and the decree of the Wayne Circuit Court was affirmed (Detroit & Mackinac Railroad Company vs. Michigan Railroad Commission, 137 N. W. Rep., 329, decided July 22, 1912).

Complainant's application for the allowance of an appeal or writ of error to the Supreme Court of the United States was denied by Mr. Justice Day. His order of denial did not state the reasons therefor. Thereupon, complainant filed its bill in this court. This bill is essentially similar to that filed in the Wayne Circuit Court, recounts the same proceedings, sets up substantially the same grounds of right and prays for substantially the same relief.

Upon the argument of the motion for preliminary injunction, many different questions were presented, but we find it necessary to consider only one; and that is whether or not the matter is res judicata, by reason of the action of the Michigan state courts. On the one hand, it is urged that complainant and the intervening shippers who approved its action have been fully heard in a court of competent jurisdiction and have been defeated by the final decree of the court of last resort; on the other hand, it is said that the proceedings in the Michigan courts were various steps to the final fixing of the rate and that there has not, as yet, been any judicial decision. Complainant's counsel in maintaining this proposition, relies essentially upon the decision of the United States Supreme Court in Prentis vs. Atlantic Coast Line, 211 U. S., 210, and it is only necessary to determine whether that case is applicable. It arose in Virginia, and it seems that, in that state, there is no constitutional separation of the legislative and judicial powers, but that the state railway commission possesses power of both characters. From its decision, which is thus both a legislative act and a judicial decree, an appeal is provided to the Supreme Court of Appeals of the state; where, also, this dual character of power continues.

In the opinion in the Prentis case (p. 227), and after stating the conclusion—a conclusion vital to the result reached—that the order and decree of the Commission was so far legislative that it would not be res judicata, but would be open to attack in subsequent litigation, Mr. Justice Holmes stated—the further conclusion—not so vital, but not irrelevant:

"And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the view of the Supreme Court of Appeals itself. Atlantic Coast Line Ry. Co. vs. Commonwealth, 102 Virginia, 599, 621. They are implied in many cases in this and other United

States Courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation, in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation has past."

It is quite obvious that what is here said about the decision of the Supreme Court of Appeals and the argument for its application to the instant case, depends utterly upon the idea that the action of the Supreme Court of Appeals, in an appeal from the Railway Commission, was so far legislative, rather than judicial in character, that it must be subject to be treated as legislation is treated. Is this, then, true of the review provided for by the Michigan statute?

We pass by the natural query whether the whole matter is not determined, without analysis of the statute, but necessarily by the constitutional policy of Michigan, whereby judicial power cannot be vested in anything but the courts, or legislative power be vested in either of the other governmental branches. The 1909 constitution of Michigan (Art. IV, Sec. 1 and 2) provides that the powers of government are divided into three departments, the legislative, executive and judicial; and that no person belonging to one department shall exercise powers properly belonging to another, except in cases expressly provided in the constitution. These provisions are the same as found in Art. III of the constitution of 1850, and this rule of strict division and limitation has been often interpreted and applied by the Supreme Court of Michigan.

In Shumway vs. Bennett, 29 Mich., 451, at page 464, Judge Campbell said:

"The judicial power must be vested in courts. Such legislative power as can be delegated at all must be delegated to municipal corporations or local boards or officers."

In Houseman vs. Kent Circuit Judge, 58 Mich., 364, at page 367. Judge Champlin said:

"The design of the constitution is that each of the three branches of the government shall be kept, as far as practicable, separate, and that one of the departments shall not exercise the powers confided by that instrument to either of the others. Any legislation, therefore, authorizing an invasion of this design and conferring upon the judiciary the exercise of powers belonging to either of the others cannot be regarded as valid."

In Telephone Co. vs. St. Joseph, 121 Mich., 502, it was expressly held that the establishing of reasonable rules and regulations for a public service corporation is a legislative or administrative function and not a judicial one. See also

Locke vs. Speed, 62 Mich., 408, and Manistee vs. Harley, 79 Mich., 238.

In the face of this clear rule that a Michigan court cannot constitutionally perform the function of which we are speaking, complainant apparently must finally come to the position that the intent of the act was to confer on the courts of Michigan, a legislative as well as a judicial power of review, and that since such intention must fail, the entire review is nugatory; but however that may be, we must at least assume that the constitutional situation raises a presumption of non-intent to confer on the courts any power of legislation.

Let us, then, examine the act, and see whether such intent is disclosed sufficiently to overcome the adverse presumption. We see no occasion to review the details as stated in the margin. In most respects, the provisions are appropriate, and appropriate only, for a judicial proceeding. In four respects only are there provisions not thus exclusively appropriate to the theory of judicial action. These are: (1) the provision in sec. 26 (a) that the action to be commenced by the carrier against the Commission to vacate its order may be "on the ground that" the rate fixed is "unlawful or unreasonable," or that some provision of the order is "unreasonable"; (2) the provision in sec 26 (a) that the court may not only vacate the order in whole or in part, but may "make such other order or decree as the courts shall decide to be in accordance with the facts and the law"; (3) the requirement found in sec. 26 (c) that the additional evidence taken before the court shall be certified to the Commission, which may set aside, modify or affirm its former order, and which must report its action to the court, which then proceeds to act with reference to the new or modified order; and (4) the implication arising from sec. 26 (e) that the controlling issue is whether the order of the Commission was "unlawful or unreasonable." The condition called the third in this enumeration is thought to tie the court and the Commission together so as to indicate the single quality of the final decision; the first and fourth are said to indicate that the court has to decide exactly the question passed upon by the Commission, viz., what is "reasonable"; and the second is said to imply the right of the court to fix for itself a reasonable rate, or such rate as it may decide to be "in accordance with the facts and the law."

If the provisions which require the court to say what is "reasonable" stood alone, unaffected by the context or the presumptions arising from the constitutional distribution of powers, it would not be easy to determine their meaning; but, with the help of these aids to interpretation, it is clear that the

word "reasonable" is here used as meaning "non-confiscatory." As was pointed out in Louisville & Nashville Railroad Co. vs. Siler, 186 Fed. Rep., 176, at page 189, the problem whether a rate or a return is reasonable is a problem with a double aspect, legislative and judicial. From the legislative standpoint, that rate or return is reasonable which is not unfair to the shipper and at the same time is large enough to meet the demands of legislative policy in promoting and encouraging railroad investments. The legislature, or the legislating administrative board, takes into account the risk involved, the community service rendered, past or prospective unprofitable periods and all other elements tending to determine what a wise policy may be, and it may well fix a rate contemplating a return much beyond the legal rate of interest upon the money invested; in other words, from this point of view, a very liberal return may be "reasonable." On the other hand, it cannot be judicially said that a rate is unreasonable unless it yields less than that minimum return which the invested capital has a right to demand,—in other words, that increment which is so inherently incidental to the investment that destroying the increment is a confiscation of the property. Only then, from the standpoint of a court, does a rate become "unreasonable"; and finding this word "unreasonable" used in this statute with reference to the action of courts, original and appellate, which can have no other view point, the word must receive this construction.

The suggestion that the court has power to fix the rate, in addition to its power to vacate the action of the commission, would also be plausible, if we observe only the single clause giving it power to "make such other order or decree, etc."; but this suggestion, likewise, must yield to the interpretation made necessary by the constitutional limitation. Again, we may refer to the opinion in the Stiler case, and particularly to pages 183-189, for a review of the cases leading to the inevitable conclusion that the rate-fixing power is legislative and is not judicial; and with equal certainty it follows that the rate-fixing function cannot be vested in or performed by a body which, like a Michigan court, cannot exercise executive or legislative power.

With these premises, it is plain that such tying together of the court and of the Commission as is accomplished by sec. 26 (c) is intended only to aid the court in its actions as a court, and not to transform the court into something else. The practice prescribed is one of convenience, entirely suitable to the elastic powers of a court of equity, and well adapted to reach a just and final disposition of the whole matter without delays and repeated trials.

We do not overlook some expressions in the opinion of the Supreme Court of Michigan, in this controversy, which may be thought inconsistent with our conclusion. That court says, "We apprehend that the words 'reasonable and just' in the statute do not mean 'non-confiscatory' as the word 'confiscatory' is usually defined." The court is here speaking, we think, of the Commission, and of the powers and duties of that body, and the words "reasonable and just" as used in the statute with reference to the Commission. The court did not expressly consider the force of the words "reasonable" or "unreasonable" as used in the statute with reference to the courts, nor whether these words might, in that connction, have a different force.

The court also said, "The duty of the courts in the premises is not essentially different from that of the Commission." It is clear that this expression was not intended in its broadest sense, because although the court indicated that the Comsion was not confined to the question whether a rate was confiscatory, the court proceeded to discuss and dispose of the case on the theory that the courts were confined to that question. The sum of the whole matter was that the bill was dismissed because the complainant did not, with sufficient certainty and clearness, prove the existence of that confiscation, the presence of which was necessary to enable courts to give relief. We are satisfied that the opinion, upon the whole, confirms our view that the Michigan courts could consider only this question and had no legislative or administrative discretion in determining what was "reasonable," and that, therefore, when complainant resorted to the courts, it invoked the protection of the judicial power.

It follows that the right of the Railway Company to such a review as any court could give became fixed when the order of the commission was promulgated; that to prevent an invasion of its legal right, the Railway Company could resort to any court of competent jurisdiction; and that, having selected the Wayne Circuit Court in Chancery, and having submitted its controversy to that court, and judgment having been rendered against complainant by that court and by the Supreme Court of Michigan the Railway Company cannot now try the same controversy over again in this court.

The motion for injunction must be denied.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION.

No. 3523.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

The Detroit & Mackinac Railroad Company,
Complainant,

vs.

Michigan Railroad Commission et al.,
Defendants.

In the above entitled cause, complainant moved for a preliminary injunction, basing such motion upon the bill of complaint and affidavits on file. Complainant appeared by Messrs. James McNamara, its solicitor, and Fred A. Baker, of counsel. The motion was opposed by the Attorney General, appearing for the Railway Commission, and by Messrs. Gillett & Clark, appearing for other parties in interest. The motion was heard before District Judge Tuttle and Circuit Judges Knappen and Denison, who had been, by the District Judge, called to his assistance, pursuant to sec. 266 of the Judicial Code.

The court, so constituted, having duly considered such motion and having filed its opinion thereon, it is therefore ordered, pursuant to such opinion, that such motion be, and the same is hereby, denied.

Approved for entry this 22nd day of March, 1913.

Loyal E. Knappen, Circuit Judge.
Arthur C. Denison, Circuit Judge.
Arthur J. Tuttle, District Judge.

AFFIDAVIT OF FRED A. BAKER, ON APPLICATION FOR ORDER SUGGESTING OF RECORD THE DEATH OF DEFENDANT FRANK W. GILCHRIST.

(Filed Mar. 23, 1913.)

UNITED STATES OF AMERICA.
IN THE DISTRICT COURT FOR THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit and Mackinac Railway Company,
Complainant,

vs.

Michigan Railroad Commission, Churchill Lumber Co., Island Mill Co., Fletcher Paper Co., Frank W. Gilchrist,
Defendants.

Eastern District of Michigan, ss.

Fred A. Baker, being duly sworn, deposes and says that while the motion for a preliminary injunction was held under advisement by the court, Frank W. Gilchrist, one of the defendants died; that he resided in the city of Alpena, Alpena County, Mich., and the Probate Court of said County appointed his four children, Frank R. Gilchrist of Cleveland, Ohio, William A. Gilchrist, of Memphis, Tenn., Grace Gilchrist Fletcher of Alpena Mich., and Ralph E. Gilchrist, of Alpena, Mich., executors of his estate and they qualified and are acting as such.

Deponent further says that he is one of the counsel for the complainant and on its behalf he suggests the death of said Frank W. Gilchrist of record, and requests that an order be granted substituting the said executors in place of said deceased as one of the defendants in this cause, and that said executors be required to enter their appearance in this cause within ten days after notice of the order, and in default thereof that the bill of complaint in this cause be taken as confessed by them.

Fred A. Baker.

Subscribed and sworn to before me this 27th day of March, A. D. 1913.

Chas. Thurman,
Notary Public, Wayne Co., Mich.

My commission expires Sept. 29, '14.

ORDER SUBSTITUTING EXECUTORS OF FRANK W. GILCHRIST, MARCH 28th, 1913.

At a session of the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity, held at the Federal Building in the City of Detroit on the 28th day of March, 1913.

Present: Hon. Arthur J. Tuttle, District Judge.

Detroit & Mackinac Railway Company,
Complainant,

vs.

Michigan Railroad Commission, Churchill Lumber Co., Island Mill Co., Fletcher Paper Co. and Frank W. Gilchrist,
Defendants.

On reading and filing the affidavit of Fred A. Baker, suggesting of record the death of the defendant, Frank W. Gilchrist, and on motion of James McNamara, solicitor for the complainant, it is ordered that Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, the executors of the estate of said Frank W. Gilchrist, deceased, be and they are hereby substituted in place of said deceased as one of the defendants in this cause, and that they be named as defendants in all future proceedings in the cause.

It is further ordered that said executors cause their appearance to be entered in the cause within ten days after service of a copy of this order, and that in default of such apeparance, the bill of complaint be taken as confessed by them.

It is further ordered that a copy of this order be served personally on those of the said executors who reside in the state of Michigan, and on the others at their respective places of residence by mail.

(Signed) Arthur J. Tuttle,
District Judge.

MOTION OF MICHIGAN RAILROAD COMMISSION TO DISMISS BILL.

(Filed April 4th, 1913.)

UNITED STATES OF AMERICA.
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Company,
Complainant,

vs.

Michigan Railroad Commission, Churchill Lumber Company, Island Mill Lumber Company, Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Ralph E. Gilchrist and Grace Gilchrist Fletcher, as executors of the last will of Frank W. Gilchrist, deceased,
Defendants.

Now comes the above named defendant, Michigan Railroad Commission, and moves the court to dismiss the bill of complaint, filed by the complainant herein, for the following reasons among others:

1. Because the bill of complaint upon its face shows that it is filed for the sole purpose of again litigating a cause of action already finally determined between the same parties in the Circuit and Supreme Courts of the State of Michigan, and further shows upon its face that the relief sought by complainant is barred and complainant's rights in respect thereto adjudicated and concluded by the decree of the State Court in said action.

2. Because the said bill of complaint does not state a cause of action arising under the constitution or laws of the United States, and states no other ground of Federal jurisdiction.

3. Because the ultimate relief sought by said bill of complaint is the issuance of an injunction in violation of the provisions of section 720 of the Revised Statutes of the United States.

4. Because there is no equity on the case of the bill of complaint.

This motion is based upon the records and files in this cause.

Grant Fellows,
Attorney General.
Thomas A. Lawler,
Assistant Attorney General,
Solicitors for Defendant, Michigan Railroad Commission.
Dated April 3rd, 1913.

To James McNamara,
Solicitor for Complainant.
Fred A. Baker,
Of Counsel.
Sirs:

Take notice that the above is a true copy of a motion this day filed in the above entitled cause, and that the same will be brought on for hearing before the Honorable Arthur J. Tuttle, District Judge, at the City of Detroit, on the 14th day of April, 1913, at the opening of court on that day or as soon thereafter as counsel can be heard.

Yours, etc.,
Grant Fellows,
Attorney General,
Thomas A. Lawler,
Assistant Attorney General,
Solicitors for Defendant, Michigan Railroad Commission.
Dated April 3rd, 1913.

MOTION OF FLETCHER PAPER CO. ET AL. TO DISMISS BILL.

(Filed April 5th, 1913.)

UNITED STATES OF AMERICA.
IN THE DISTRICT COURT OF THE UNITED STATAES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Company,
Complainant,

vs.

Michigan Railroad Commission, Churchill Lumber Company, Island Mill Lumber Company, Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Ralph E. Gilchrist and Grace Gilchrist Fletcher, as executors of the last will of Frank W. Gilchrist, deceased,
Defendants.

Now come the above named defendants, Churchill Lumber Company, Island Mill Lumber Company, Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Ralph E. Gilchrist, and Grace Gilchrist Fletcher as executors of the last will of Frank W. Gilchrist, deceased, (appearing specially and without submitting themselves generally to the jurisdiction of the court), and move the court to dismiss the bill of complaint, filed by the complainant herein, for the following reasons among others:

1. Because the bill of complaint upon its face shows that it is filed for the sole purpose of again litigating a cause of action already finally determined between the same parties in the Circuit and Supreme Courts of the State of Michigan, and further shows upon its face that the relief sought by complainant is barred and complainant's rights in respect thereto adjudicated and concluded by the decree of the state court in said action.

2. Because the said bill of complaint does not state a cause of action arising under the constitution or laws of the United States, and states no other ground of federal jurisdiction.

3. Because the ultimate relief sought by said bill of complaint is the issuance of an injunction in violation of the

provisions of Section 720 of the Revised Statutes of the United States.

4. Because there is no equity on the face of the bill of complaint.

This motion is based upon the records and files in this cause.

Gillett & Clark,
Solicitors for defendants, Churchill Lumber Company, Island Mill Lumber Company, Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Ralph E. Gilchrist, and Grace Gilchrist Fletcher, as executors of the last will of Frank W. Gilchrist, Deceased.
Dated April 4th, 1913.

To James McNamara,
Solicitor for Complainant.
Fred A. Baker,
Of Counsel.
Sirs: —

Take notice that the above is a true copy of a motion this day filed in the above entitled cause, and that the same will be brought on for hearing before the Honorable Arthur J. Tuttle, District Judge, at the City of Detroit, on the 14th day of April, 1913, at the opening of court on that day or as soon thereafter as counsel can be heard.

Yours, etc.,
Gillett & Clark,
Solicitors for Churchill Lumber Company et al.
Dated April 4th, 1913.

PETITION FOR ALLOWANCE OF APPEAL.

(Filed April 7th, 1913.)

UNITED STATES OF AMERICA.
THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Company,
Complainant,

vs.

Michigan Railroad Commission, Churchill Lumber Co., Island Mill Co., Fletcher Paper Co., and Frank R. Gilchrist, William A. Gilchirst, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, executors of the estate of Frank W. Gilchrist, deceased,
Defendants.

To the Honorable the Judges of said Court:

Your Petitioner, The Detroit & Mackinac Railway Company, showeth:

1. That your Petitioner filed his bill of complaint in this cause on the 17th day of August, 1912, and process for the appearance of the defendants was duly issued and served on each and all of the defendants seasonably, and said cause ever since then has been pending in this court.

2. That on the said 17th day of Aug., 1912, your petitioner gave notice that on the 26th day of August, 1912, at the opening of court or as soon thereafter as counsel could be heard the complainant would move the court to grant a preliminary injunction in the cause as prayed in the bill of complaint, that is to say, an injunction restraining the defendants until the final hearing of the cause from enforcing or attempting to enforce by any action, proceeding or otherwise the said order of Oct. 22, and Nov. 3, 1909, of the Michigan Railroad Commission.

That notice of said motion with a copy of the bill of complaint was duly served on the Governor of the State, and the Attorney General, and on the Michigan Railroad Commission, and on each of the other defendants, at least five days before said motion was heard and determined.

3. That said motion was presented to the Honorable Arthur J. Tuttle, District Judge, who thereupon called to his

assistance the Hon. Loyal E. Knappan, United States Circuit Judge, and Hon. Arthur C. Denison, United States Circuit Judge, and the said motion for a preliminary injunction was argued and submitted to the said three judges on the 28th day of September, 1912; and all parties to the suit were represented by counsel at said hearing.

4. That on the 22d day of March 1913 said three judges filed their opinion in the case, and granted an order denying the motion for an injunction, and your petitioner, being aggrieved by said order, desires to appeal, and does appeal, therefrom the Supreme Court of the United States.

5. Your petitioner herewith files an assignment of error as required by Supreme Court Rule No. 35.

Wherefore your petitioner prays that its appeal from said order of March 22, 1913, denying said motion for an injunction, may be allowed and the penalty of the appeal bond to be filed by your petitioner may be fixed by an order of this court, and that said bond and the surety therein may be duly approved.

The Detroit & Mackinac Railway Company,
By James McNamara,
Its Solicitor.

James McNamara,
Solicitor for Complainant and Appellant.
Fred A. Baker,
Of Counsel.

Eastern District of Michigan, ss.

On the 7th day of April, 1913, before me the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division, personally appeared James McNamara, Solicitor for the Detroit and Mackinac Railway Company and made oath that he has read and knows the contents of the above and foregoing petition by him subscribed, and that the same is true of his own knowledge.

Elmer W. Voorheis,
Clerk U. S. Dist. Court, Eastern Dist. of Michigan.

ASSIGNMENT OF ERROR.

(Filed April 7th, 1913.)

STATE OF MICHIGAN.
THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

IN EQUITY.

Detroit & Mackinac Railway Company,
Complainant & Appellant,
vs.
Michigan Railroad Commission, Churchill Lumber Company, Island Mill Co., and Fletcher Paper Co., Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher and Ralph E. Gilchrist, executors of the estate of Frank W. Gilchrist, deceased,
Defendant and Appellees.

The complainant and appellant, by James McNamara, its solicitor, says that there is manifest error in the record and proceedings aforesaid, and in the decree and judgment of the court, denying the motion of the complainant for a preliminary injunction, in this, to-wit:

1. The court, consisting of the three judges who heard and determined the motion for an injunction, erred in refusing to grant the injunction prayed, and in denying said motion.

2. The court erred in taking jurisdiction of the question whether the powers conferred upon the state courts by the act creating the Michigan Railroad Commission, (No. 300 Public Acts of Mich., 1909, pp. 704-733), to review the orders of the commission are under the constitution of Michigan, judicial and not legislative.

3. The court erred in refusing to hold that the powers conferred upon the state courts by said Act, are legislative powers and not judicial.

4. The court erred in refusing to hold that the Federal courts should determine for themselves whether any given action of a state government is legislative or not by considering the nature of the power exercised and should not allow that question to depend upon which one of the three departments of the state government took the action called in question in any case.

5. The court erred in refusing to hold that there is nothing in the constitution of the United States, which prevents a state from commingling the powers of government,

either by constitutional provision, by legislative enactment, or by judicial decision.

6. The court erred in refusing to follow the decision and instruction contained in the opinion of the court by Mr. Justice Holmes in Prentiss vs. Atlantic Coast Line, 211 U. S., 210, and in practically overruling that case, by untenable efforts to distinguish it from the present case.

7. The court erred in holding that the said decision of the state Supreme Court, affirming the decree of the Wayne Circuit Court in Chancery, in res adjudicata, and conclusive and final.

8. The court erred in holding that the complainant voluntarily invoked the judicial power of the state courts, when it is apparent on the face of the record, that the complainant filed his bill in the Circuit Court of the county of Wayne, in Chancery, in obedience to the requirements imposed upon it by the Supreme Court of the United States in Prentiss vs. Atlantic Coast Line, 211 U. S., 210.

9. The court erred in ignoring the fact that the said act of the State Legislature confers the same powers on the state courts as those exercised by the Michigan Railroad Commission, and that the Supreme Court of the state has already held that the powers conferred on the commission are not judicial powers. Michigan Central Railroad Co. vs. Michigan Railroad Commission, 160 Mich., 355.

10. The court erred in holding that the constitution of Virginia is so essentially different from the constitution of Michigan that the decision of the Supreme Court of the United States in Prentiss vs. Atlantic Coast Line, 211 U. S., 210, is not a binding authority in the present case.

11. The court erred in overlooking the fact that the constitution of Michigan is identical with the constitution of Virginia, the only difference being that the constitution of Virginia creates a state corporation commission, and the constitution of Michigan provides that such a commission may be created by law, and that the power conferred on the state court or courts to review the orders of the commission and to make such orders as the commission ought to have made is the same in both states.

12. The court erred in assuming that if the state conferred upon its judicial department the entire rate making power, from start to finish, the findings of fact of that department would be conclusive and final, and beyond review by the Federal judiciary; and that thereby the due process of law clause of the Fourteenth Amendment of the constitution of the United States would be suspended, as far as the facts of any case were concerned.

Wherefore complainant and appellant prays that the said order of the District Court, of Mar. 22, 1913, may be vacated and reversed, and that said court may be directed by the mandate of the Supreme Court of the United States, to entertain jurisdiction of said bill of complaint and to proceed with the determination of the same according to the rules and practice of the court.

James McNamara,
Solicitor for Complainant and Appellant.

Fred A. Baker,
Of Counsel.

BOND ON APPEAL.

(Filed April 7 1913.)

Know all men by these presents, that we the Detroit and Mackinac Railway Company, a railroad corporation under the laws of Michigan, as principal and American Surety Company of New York, as surety are held and firmly bound unto the Michigan Railroad Commission, The Churchill Lumber Company, The Island Mill Company, the Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, Executor of the Estate of Frank W. Gilchrist, deceased, in the full and penal sum of Ten Thousand dollars to be paid to said obligees, their executors, administrators, successors, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of April, 1913.

Whereas lately at Detroit in the United States District Court for the Eastern District of Michigan, Southern Division, in a suit pending in said court between the Detroit and Mackinac Railway Complainant, and the Michigan Railroad Commission, the Churchill Lumber Company, the Island Mill Company, the Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, Executor of the estate of Frank W. Gilchrist, deceased, as defendants, a decree and judgment was rendered against the said Detroit and Mackinac Railway Company, denying a motion for an injunction.

And whereas the said the Detroit and Mackinac Railway appeals from said decree and judgment to the Supreme Court of the United States, and desires to obtain an allowance of its appeal, and a citation notifying said obligees of the same, and desires to file an appeal bond.

Now therefore the condition of the above obligation is such that if the said Detroit and Mackinac Railway Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

(S S) Detroit & Mackinac Railway Company.
By George M. Crocker,
2nd Vice President.

American Surety Company of New York (L. S.)
(Seal Am. Surety Co.) By Frederick L. Fraser.
Resident Vice President.
Attest Wm. L. McGovern,
Resident Assistant Secretary.

Approved:
Arthur J. Tuttle,
District Judge of the United States, District Court for the Eastern District of Michigan.

ORDER ALLOWING APPEAL.

At a session of the District Court of the United States, for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District on Monday the seventh day of April in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Arthur J. Tuttle, District Judge.

No. 5523.

Detroit and Mackinac Railway Company,
Complainant,

vs.

Michigan Railroad Commission, The Churchill Lumber Company, Island Mill Company, Fletcher Paper Company and Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, executors of the estate of Frank W. Gilchrist, deceased,

Defendants.

On reading and filing the petition of the Detroit and Mackinac Railway Company, complainant, praying for the allowance of an appeal to the Supreme Court of the United

States from the order in this cause, denying the motion of the complainant for a preliminary injunction as prayed in the bill of complaint, and an assignment of errors having been submitted and filed with said petition, on motion of James McNamara, solicitor for the complainant, it is ordered that said appeal be and the same is hereby allowed; that the penalty of the appeal bond be and the same is hereby fixed at the sum of ($10,000.00) Ten thousand dollars, and the bond and the surety therein tendered by the complainant, are hereby approved, and the citation herewith signed in open court.

Arthur J. Tuttle,
District Judge.

CITATION AND PROOF OF SERVICE.

(Filed April 10, 1913.)

United States of America, ss:

The President of the United States of America to the Honorable the Judges of the District Court for the United States for the Eastern District of Michigan, Southern Division, In Equity, Greeting:

To the Michigan Railroad Commission, the Churchill Lumber Company, the Island Mill Company, the Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, Executors of the Estate of Frank W. Gilchrist, deceased.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof in pursuance of an appeal perfected and filed in the office of the Clerk of the District Court of the United States, for the Eastern District of Michigan, Southern Division, In Equity, wherein the Detroit and Mackinac Railway Company is appellant and you are the appellees, to show cause if any there be, why the decree and judgment rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States this 7th day of April, 1913.

Arthur J. Tuttle,
District Judge of the District Court of the United States, for the Eastern District of Michigan.

State of Michigan, County of Ingham, ss:

Jay Mertz, being duly sworn, deposes and says that on the 8th day of April, 1913, he served a copy of the Citation

hereto attached upon Hon. Grant Fellows, Attorney General of Michigan, by delivering the same to him personally; at the same time exhibiting this original; that he served a copy of said Citation upon Lawton T. Hemans, Chairman of the Michigan Railroad Commission, by delivering the same to him personally, at the same time exhibiting the original, at his office in the Oakland Building, Lansing, Michigan, on the 8th day of April, 1913.

(Seal of Supreme Court of Michigan.) Jay Mertz.

Subscribed and sworn to before me this 8th day of April, 1913.

Chas. C. Hopkins,
Clerk of the Supreme Court.

Eastern District of Michigan, ss:

Fred A. Baker, being duly sworn, deposes and says that on the 10th day of April, 1913, he served a true copy of the above Citation, on Gillett & Clark, Solicitors of all the Appellees, other than the Michigan Railroad Commission, by mailing the same postage prepaid to them at Bay City, Mich., their place of business and residence.

Fred A. Baker.

Subscribed and sworn to before me this 10th day of April, 1913.

Carrie Davison,
Deputy Clerk U. S. Dist. Court, Eastern District of Michigan.

DESIGNATION OF RECORD WITH PROOF OF SERVICE.

(Filed April 8th, 1913.)

UNITED STATES OF AMERICA.
THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Company,
Complainant and Appellant,

vs.

Michigan Railroad Commission, et al.,
Defendants and Appellees.

And now comes the complainant and appellant by James McNamara, its solicitor, and indicates the portions of the record to be incorporated into the transcript on its appeal from

the order and decree of the court, denying the complainant's motion for a preliminary injunction, viz.

1. The Bill of Complaint.
2. The Motion for Injunction.
3. Demurrer of Fletcher Paper Co. et al.
4. Demurrer of Michigan Railroad Commission.
5. Objections and affidavits of defendants, Fletcher Paper Co. et al., on application for preliminary injunction. (with printed record and briefs in Supreme Court of Mich. omitted.)
6. Answer of Michigan R. R. Commission on application for injunction.
7. Journal entry of submission ot motion.
8. Opinion on motion.
9. Order denying motion.
10. Order substituting executors of Frank W. Gilchrist.
11. Motion by Michigan R. R. Commission to dismiss bill.
12. Motion by Churchill Lumber Co. et al., to dismiss bill.
13. Petition for allowance of appeal.
14. Assignment of errors.
15. Bond on appeal.
16. Order allowing appeal.
17. Citation with proof of service.

To Hon. Grant Fellows,
Attorney General,
Solicitor for Michigan Railroad Commission,
Gillett & Clark,
Solicitors for Churchill Lumber Co. et al.,

Gents:

You will please take notice that on the 8th day of April, 1913, a praecipe for reduction of record under new equity rule 75, was filed in the above entitled cause by the appellant and of which the above and foregoing is a true copy.

Detroit, April 8, 1913.

Jas. McNamara,
Solicitor for complainant and appellant.
Fred A. Baker,
Of Counsel.

Eastern District of Michigan, ss:

On this the 8th day of April, 1913, before me Clerk of the U. S. District Court for the Eastern District of Michigan, personally appeared Fred A. Baker, and made oath that on the 8th day of April, 1913, at Detroit, in said district, he

mailed postage prepaid, a true copy of the above and foregoing praecipe and notice to Hon. Grant Fellows, Attorney General, at Lansing, Mich., and Gillett and Clark, attorneys at Bay City, Michigan, their respective places of residence and business.

Carrie Davison,
Deputy Clerk U. S. Dist. Court, East. District of Michigan.

PRAECIPE FOR PREPARATION OF RECORD.

(Filed April 29, 1913.)

UNITED STATES OF AMERICA.
IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

IN EQUITY.

Detroit & Mackinac Railway Company,
Complainant and Appellant,

vs.

Michigan Railroad Commission, et al.,
Defendants and Appellees.

Now comes the defendants, Churchill Lumber Company, et al., by Gillett & Clark, their solicitors, and designate the following portions of the record in addition to those designated by appellant, to be incorporated into the transcript on complainant's appeal from the order denying complainant's motion for a preliminary injunction, viz:

A summary of the contents of the record and briefs in the Supreme Court of Michigan mentioned in and made a part of the affidavit of Hezekiah M. Gillett, filed by these defendants in opposition to said motion for an injunction.

A copy of such summary is annexed hereto and made a part of this praecipe.

In case the solicitors for the appellant do not consent to the inclusion of such summary in the transcript, these defendants demand that such parts of the said printed record and briefs, be incorporated into the said transcript as may be necessary to evidence the facts recited in such summary.

Gillett & Clark,
Solicitors for Defts. Churchill Lumber Company, et al.

SUMMARY OF THE CONTENTS OF THE PRINTED RECORD AND BRIEFS IN THE SUPREME COURT OF MICHIGAN, FILED WITH THE AFFIDAVIT OF HEZEKIAH M. GILLETT.

The printed record contains the following:

1. Testimony and proceedings before the Michigan Railroad Commission dated from February 23, 1909, to November 3, 1909, and consisting of 123 printed pages. On the hearing before the Commission three witnesses were sworn on behalf of the petitioners and four witnesses were sworn on behalf of the respondent Detroit & Mackinac Railway Company.

2. Complainant's bill of complaint filed in the Circuit Court for the County of Wayne in chancery on November 20, 1909, the nature and contents of said bill of complaint (as amended) being correctly described in the opinion of Judges Knappen, Denison and Tuttle filed herein.

3. Petition of the Fletcher Paper Company for leave to intervene.

4. Petition of Frank W. Gilchrist, Churchill Lumber Company and Island Mill Lumber Company for leave to intervene.

5. Order permitting the above named parties to intervene.

6. Answer of Michigan Railroad Commission denying (among other things) that its orders, if put into operation, would injure or destroy complainant's property rights or interests, also denying that such orders were contrary to the legal rights of the complainant, and denying that the complainant was entitled to the relief prayed for.

7. Answer of Fletcher Paper Company containing the same denials, among others.

8. Answer of Frank W. Gilchrist, Churchill Lumber Company and Island Mill Lumber Company containing the same denials among others.

9. Amendments to the Complainant's bill of complaint consisting of the following allegations among others:

"This complainant has been advised and respectfully submits that the said logging spurs and branches and its rates and charges thereon are not within the jurisdiction or powers of the Michigan Railroad Commission, or of the legislature of Michigan, or of the Interstate Commerce Commission, or the Congress of the United States, and that the orders of the Michigan Railroad Commission complained of in this case and dated October 22, 1909, and November 3, 1909, and October 19,

1909, (Exhibits 1, 2, and 3 of the bill) would, if enforced, deprive this complainant of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

XXX.

"This complainant further shows unto the court that the rates for the shipment of logs into Alpena, fixed by its local freight tariff, as shown by Exhibit A of this bill, are reasonable and just, and do not exceed the actual cost thereof, with a reasonable profit added; that the service so rendered is not that kind of service this complainant may be required in the public interest to do at less than cost, and a fair profit; that the orders of the Michigan Railroad Commission of 22d day of October, 1909, and 3d day of November 1909, and of October 19, 1909, fixing the rates to be charged by this complainant, would if enforced compel this complainant to perform such service for less than cost and a fair profit, and it is advised and it respectfully submits that said orders and the rates fixed therein are in conflict with the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

XXXI.

"This Complainant further shows unto the court that the railroad property used in the maintenance and operation of its railroad, including the investment in the private logging spurs and branches as herein described, are of great value, to-wit: of the value of $4,585,000; that the cost of reproducing the same less depreciation from age and wear and tear, would equal said sum; that the total revenue of the company for the year ending June 30, 1909, was only $1,164,848.86; and that its operating and maintainance expenses, and the taxes paid for that year, all of which were economically and prudently incurred, amounted to $881,389.52, leaving a net profit on the investment of $283,459.34, or a small fraction less than 6 1/5 per cent; that if the orders of the Michigan Railroad Commission of October 22, 1909, November 3, 1909, and October 19, 1909, are enforced the earning capacity of the capital investment of this complainant will be seriously impaired and reduced below the reasonable and legitimate earnings of similar railroad property in the State of Michigan and in the United States of America, and to less than this complainant is entitled to earn before it can be required to perform any particular part of the service it renders the public for less than the actual cost thereof; and this complainant has been advised and respect-

fully submits that said orders, and each and every of them, and the rates therein fixed are in conflict with the constitution and laws of the state of Michigan and with the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

XXXII.

"This complainant further shows unto the court that the timber tributary to its main line and that within reach of any logging branches it may construct is gradually being exhausted and the revenue derivable from the hauling of logs and lumber by this complainant will steadily decrease, and in ten or fifteen years will almost wholly cease; that there is no other production in the section of country through which the road runs to take the place of logs and lumber as the stone and cement produced at Alpena are more cheaply and conveniently transported to the lower lake ports by water; that the road is not part of a trunk line, and that unless this complainant is permitted to build up a sinking fund, its capital investment will be seriously impaired and a considerable portion thereof wholly lost; that in view of these undoubted facts this complainant should be permitted to maintain rates of fare and freight which would earn net profits as much as ten per cent of its capital investment; and this complainant has been advised and respectfully submits that any reduction of the rates of this complainant by the Michigan Railroad Commission which would result in the impairment of its capital investment would be in conflict with the Constitution and laws of Michigan and in violation of the Fourteenth Amendment of the Constitution of the United States.

"The allegations contained in the foregoing amendments to the bill of complaint in this cause are made for the purpose if need be, of invoking the jurisdiction of the Supreme Court of the United States to review the decree of the Supreme Court of Michigan in this cause."

10. Answer of Michigan Railroad Commission to amended bill of complaint denying the allegations above set forth.

11. Answer of Fletcher Paper Company to amended bill of complaint denying the allegations above set forth.

12. Answer of Frank W. Gilchrist, Churchill Lumber Company, and Island Mill Lumber Company to amended bill of complaint denying the allegations above set forth.

13. Testimony of various witnesses taken in and before the Circuit Court for the County of Wayne in chancery upon the issues raised by the pleadings filed in said court, said testimony consisting of 538 printed pages, taken in the manner and form usual in chancery cases, and comprising the testimony of

nine witnesses who were sworn on behalf of the complainant and of seventeen witnesses sworn on behalf of the defendants. Complainant introduced in evidence thirty-nine exhibits and defendants sixty exhibits in addition to those introduced in evidence before the Railroad Commission. The taking of testimony was commenced on the first day of June 1910, and completed on the 15th day of August 1910.

14. Certificate of resubmission to Michigan Railroad Commission.

15. Opinion of Michigan Railroad Commission to the effect that its former orders should not be rescinded.

16. Opinion of Wayne Circuit Judge which is in part as follows:

"The few later authorities hereafter cited establish beyond question the following propositions:

(1) Rate making is peculiarly a legislative rather than a judicial function.

(2) Under appropriate circumstances, the Legislature may delegate its power to a Commission constituted for that purpose.

(3) Legislative action on the subject is at all times subject to judicial review.

(4) Courts may not make rates, the limit of judicial authority being to inquire whether or not the rates as fixed are so unreasonable as to be confiscatory.

(5) As in all cases where a legislative enactment is attacked, the presumption of the validity of the enactment is very strong, and judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property as to compel the court to say that the rates prescribed will necessarily have the effect of denying just compensation for private property taken for the public use. (Our statute specifically places the burden of proof upon the complainant. 26E.)

(6) Each case presented depends for its determination upon the particular facts and circumstances therein involved.

(7) Among the great many facts and circumstances to be considered by a court, a few of the more prominent are as follows:

(a) The interest of the public in the subject matter.

(b) The interest of the particular shipper or shippers affected by the rate in question.

(c) The character of the commodity.

(d) The cost to the railway of the service.

(e) The character and location of the railway, as affected by the topography, geography and population of the country traversed.

(f) The amount of inter and intra state earnings and the effect upon either or both, of the rate fixed.

(g) The real value of the railway property, as distinguished from its capitalization of the amount of its bonded debt.

(h) Its legitimate, proper and necessary disbursements.

(i) What in the light of all the circumstances, would be a fair return upon the capital actually invested.

"The foregoing difficult and intricate items, with other circumstances at different times, are all essential factors for the court to consider, but no one of them may with any degree of propriety be regarded, standing alone, as the determining factor in the solution of the ultimate question in each case. That question is, Will the rate complained of so seriously affect the railroad as to amount to a deprivation of its property, without adequate compensation or due process of law? (Citing cases) * * * * *

"It is obvious from the previous reasoning in this opinion, that the court cannot view or determine these questions involved as though sitting as a railroad commission. It must approach its determination having in view at all times the settled rules of the law regardless of the peculiar equities attaching to the case. As there are two orders now being complained of before the court, they will be regarded separately. So far as concerns the switching charge to Fletcher's Dam, it needs no reasoning to demonstrate that while the rate fixed by the Commission will in a small degree reduce the earnings of the Railroad Company, yet it cannot be said to be confiscatory in its nature. The courts have gone so far as to hold that even though certain commodities be carried at a loss, or a certain service rendered at a loss, that was not ground for judicial interference with a legislative function, so long as the road earned enough on other business to yield a fair return on the investment. The bill will therefore be dismissed as to that order.

"The order setting aside M. R. C. 205 is not so easy of disposition. The court is compelled to determine whether a loss of about $30,000 per annum for the next five years will amount to a confiscation of the property of this railroad. With a valuation of five million dollars, it earned last year 5 9/10 per cent. Had the rates complained of been in effect, it would have earned 5 3/10 per cent. Confessedly a decrease in earnings of $30,000 per annum, which is more than ten per cent of its entire earnings, is a most serious matter, and presumably was given serious and thoughtful consideration by the Railway Commission when it took the confessedly drastic step that it did. But can the court say that these rates as fixed by the

Commission, "Are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just, both to the owner and the public * * * such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use?"

San Diego Land Co. vs. National City, Supra.

"Can the court say that this situation will 'work a practical destruction to the rights of property?' "

Regan vs. Farmers' Loan & Trust Co., supra.

"Can the court say that this rate is 'So unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures?' "

Smith vs. Ames, supra.

"The query when put in language extracted from the opinions of the highest court in this land, practically answers itself. At no time in any decision has any court assumed to say what return on capital is essential to avoid a regulation being charged with confiscation, and probably no court can or will assume so to do. Each case is peculiar unto itself. It has been urged in the case at bar that because a real estate loan in Alpena brings seven per cent, that this company should be entitled to earn seven per cent on its investment. The court will take judicial notice of the fact that railroads are few that earn any such amount, and the average earnings of roads of this description throughout the United States is a very much smaller per cent indeed. It should be borne in mind in this case, that because of the character of the business involved, the road will only be seriously affected by this rate for about five more years. Judicial interference should never occur unless the case presents clearly beyond all doubt such a flagrant attack upon the rights of property, under the guise of regulation, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

San Diego vs. National City, supra.

"While undoubtedly the rates prescribed by the Commission seriously affect the railroad, the effect is not of the class that permits the court to afford relief. Counsel for the Company in his very able brief points out with much force the effect of recent state regulation upon the earning power of this railroad, the large taxes paid, the two cent fare law, the excess baggage law, and other matters of legislation and regulation which undoubtedly have proven sources in this particular instance of serious concern, and were his brief before the

court as a railroad commissioner rather than as a branch of the judiciary, a different conclusion would be reached. But under the facts as they are disclosed by this record, and the authorities examined, the bill of complaint cannot be maintained.

"A decree may therefore be entered dismissing the bill of complaint, with the usual costs to be taxed."

17. Complainant's motion for re-hearing.

18. Decree of the Circuit Court for the County of Wayne in chancery, dismissing the bill of complaint.

19. Complainant's claim of appeal in the usual form in chancery proceedings.

20. Complainant's bond on appeal in the usual form in chancery proceedings.

The printed brief for complainant and appellant Detroit & Mackinac Railway Company contains arguments in support of the following claims, among others:

1. The logging branches are not under the jurisdiction of the Michigan Railroad Commission. (20 pages.)

2. The decrease of revenue to the Railway Company would be so great as to be practically confiscatory under Railroad Commission rates. (18 pages.)

The printed brief for the intervening complainants and appellants contains arguments in support of the following claims among others.

1. The railroad Commission has no jurisdiction over complainant's logging branches. (4 pages.)

2. The act creating the Michigan Railroad Commission is fair on its face but as construed and enforced by the court below in this case it is in conflict with the fourteenth amendment of the Constitution of the United States. (8 pages.)

The printed brief of the Attorney General of the State of Michigan for the Michigan Railroad Commission contains arguments in support of the following claims, among others:

1. The Detroit & Mackinac Railway Company is a common carrier on its branches. (4 pages.)

2. The power and authority of the Michigan Railroad Commission to establish rates is administrative and the act under which it operates does not vest in the courts authority to establish rates. (4 pages.)

3. The enforcement of the orders made by the Michigan Railroad Commission would not reduce the revenue of the Railway Company to such an extent as to amount to the confiscation of its property. (21 pages.)

The printed brief of the intervening defendants contains arguments in support of the following claims, among others.

1. The rate making powers are legislative, and the only control which the courts have over the rates and regulations

fixed by the Legislatures or Commissions is to set them aside altogether if the rates fixed or regulations prescribed entail such a loss upon the Railroad Company as to be confiscatory. (4 pages.)

2. The Commission has authority over logging branches. (7 pages.)

3. The enforcement of any one of the Commission's orders separately or of all of them combined would not result in confiscation. (18 pages.)

We hereby stipulate that the above summary may be included in the transcript on appeal in lieu of the printed records and briefs filed in the Supreme Court of Michigan. (See foot note.)

James McNamara,
Solicitor for Complainant.
Grant Fellows,
Attorney General of the State of Michigan as solicitor for the Michigan Railroad Commission.
Gillett & Clark,
Solicitors for defendants Churchill Lumber Company, et al.

Foot Note.

The solicitor for the complainant and appellant signs this stipulation because he does not regard the record and briefs in the Supreme Court of the state as a legitimate part of the record in this case, which must be disposed of on the allegations of the bill herein, and the case can not be tried or heard on issues of fact which have not yet been framed in the case, and cannot be until an answer is filed in the case.

State of Michigan, County of Bay, ss.

Laura Braun, being duly sworn deposes and says that on the 17th day of April, A. D. 1913, she served a praecipe for preparation of record of which the annexed is a true copy, upon James McNamara and Fred A. Baker, Solicitors for the Complainant in the within entitled cause, by carefully enclosing the same in a sealed envelope plainly addressed to the said McNamara and Baker at Majestic Building, Detroit, Michigan, and 420 Ford Building, Detroit, Michigan, that being his business address, and depositing the same in the United States Post Office in the City of Bay City, with postage fully prepaid.

Laura Braun.

Subscribed and sworn to before me this 17 day of April, A. D., 1913.

Jessie Thompson,
Notary Public in and for Bay County, Michigan.
Com. Exp. April 4th, 1915.

ORDER EXTENDING TIME TO FILE AND DOCKET PRINTED RECORD ON APPEAL.

No. 5523.

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District, on Wednesday the seventh day of May in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Arthur J. Tuttle, District Judge.

No. 5523.

Detroit & Mackinac Railway Co.,

Complainant,

vs.

Michigan Railroad Commission, et al.,

Defendants.

In this cause upon the application of Elmer W. Voorheis, Clerk of said court, for cause shown, it is by the court now here ordered that the time to docket and file printed record on appeal herein be, and the same is hereby extended to and including the 7th day of June, A. D. 1913.

Arthur J. Tuttle,
District Judge.

ORDER EXTENDING TIME TO JULY 1, 1913, TO FILE AND DOCKET RETURN ON APPEAL.

At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room, in the City of Detroit, in said District, on Saturday the Seventh day of June, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Arthur J. Tuttle, District Judge.

IN EQUITY, No. 5523.

Detroit & Mackinac Railway Company,
Complainant,

vs.

Michigan Railroad Commission, et al.,
Defendants.

In this cause upon the application of Elmer W. Voorheis, Clerk of said court, for cause shown, it is by the court now here ordered that the time to docket and file printed record on appeal herein be and the same is hereby extended to and including the first day of July, A. D., 1913.

Arthur J. Tuttle,
District Judge.

United States of America,

In the District Court of the United States for the Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that the within and foregoing is a true and correct transcript of all and every part of the record and proceedings of the within entitled cause designated by counsel for respective parties to be included in the record on appeal; that I have compared such designated portions with the originals on file and of record in my office, and that the same is a true and correct transcript of the whole and of every part thereof as designated.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said court, at Detroit, in said District, this sixteenth day of June in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal of the U. S. District Court, Eastern District of Mich.]

ELMER W. VOORHEIS, *Clerk.*

Endorsed on cover: File No. 23,767. E. Michigan D. C. U. S. Term No. 616. Detroit & Mackinac Railway Company, appellant, vs. The Michigan Railroad Commission, Churchill Lumber Company, et al. Filed June 28th, 1913. File No. 23,767.

Supreme Court of the United States

OCTOBER TERM 1914.

NO. 209.

Detroit and Mackinac Railway Company,
Appellant,

vs.

Michigan Railroad Commission, Churchill Lumber Company, Island Mill Company, Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, Executors of the Estate of Frank W. Gilchrist, Deceased.

(Appeal from the District Court of the United States for the Eastern District of Michigan.

MOTION TO DISMISS, AFFIRM, OR TRANSFER TO SUMMARY DOCKET.

GRANT FELLOWS,
Attorney General of the State of Michigan.
Solicitor of record for Appellee, Michigan Railroad Commission.

EDWARD S. CLARK,
(Of Gillett & Clark, Bay City, Michigan.)
Solicitor of record for Appellees other than Michigan Railroad Commission.

In the Supreme Court of the United States

Detroit and Mackinac Railway Company, Appellant,

vs.

Michigan Railroad Commission, Churchill Lumber Company, Island Mill Company, Fletcher Paper Company, and Frank R. Gilchrist, William A. Gilchrist, Grace Gilchrist Fletcher, and Ralph E. Gilchrist, Executors of the Estate of Frank W. Gilchrist, Deceased, Appellees.

October Term, 1914. No. 209.

MOTION TO DISMISS APPEAL OR TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET.

Now come the above named appellees by their solicitors of record herein and move this Honorable Court:

First: To dismiss the appeal herein on the ground that this Court has not jurisdiction thereof.

Second: To affirm the order of the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, on the ground that it is manifest that this appeal was taken for delay only and that the questions on which the decision of this cause depend are so frivolous as not to need further argument.

Third: If this Court should refuse to dismiss or to affirm, then to transfer this cause for hearing to the Summary Docket, because the cause is of such a character as not to justify extended argument.

GRANT FELLOWS,
Attorney General of the State of Michigan,
Solicitor of record for Appellee
Michigan Railroad Commission.

EDWARD S. CLARK,
(Of Gillett & Clark, Bay City, Michigan.)
Solicitor of record for Appellees other than Michigan Railroad Commission.

NOTICE OF MOTIONS.

To Detroit & Mackinac Railway Company,
Appellant.

You are hereby notified that the appellees in the above entitled cause will on Monday, the 19th day of October, 1914,

at the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of said Court, the foregoing motions and each of them, and the brief in support thereof hereto annexed, all of which are now served upon you herewith.

Yours, etc.

Grant Fellows,
Edward S. Clark,
Solicitors for Appellees.

STATEMENT OF THE FACTS AND OBJECTS OF THIS MOTION.

This case involves an attempt by the complainant and appellant railroad company to annul and enjoin the enforcement of certain orders made by the defendant and appellee Michigan Railroad Commission. The other defendants and appellees are shippers of forest products in Michigan who are interested in the enforcement of the orders in question and who were the original petitioners before the Railroad Commission. This bill of complaint was filed August 17, 1912. (Record, p. 1.) Almost three years prior to that date, a bill of the same nature, and designed to accomplish the same purpose, had been filed in one of the state courts (the Circuit Court for the County of Wayne, in Chancery), and the decree dismissing that bill had been affirmed on appeal to the Michigan Supreme Court. The case is reported as Detroit & Mackinac Railway Company vs. Michigan Railroad Commission, 171 Mich. 335, and the opinion is also printed in full in the present record. (pp. 27-50.) On or about August 10, 1912, Mr. Justice Day, of this Court denied an application made by the railroad company for a writ of error from this Court to review the decree of the State Supreme Court. (Record, pp. 52, 60.)

The railroad company thereupon filed the bill of complaint in the case at bar. It was in the form of an original bill, but nevertheless followed very closely the lines of the bill previously filed in the State Court. As stated in the opinion of the Court below (Record, p. 60), the two bills of complaint were "*essentially similar*," "*recount the same proceedings, set up substantially the same grounds of right, and pray for substantially the same relief.*" The correctness of this description and characterization is conceded. (Record, p. 82.) Among other relief, the bill prayed for a preliminary injunction. As required by Section 266 of the Judicial Code, the motion for the injunction was heard by Circuit Judges Knappen and Dennison of the Sixth Circuit, and District Judge Tuttle, of the Eastern District of Michigan. The defendants (now the appellees), filed in writing their reasons for contesting the issuance of the preliminary injunction, raising the defense of *res judicata*, and attacking the jurisdiction of the Court and the equity of the bill. (Record, pp. 25-55.) They had previously filed demurrers upon substantially the same grounds. (Record, pp. 22-24.) For this reason the argument on the motion for a preliminary injunction became virtually an argument upon the question of the validity of the bill of complaint, although the answer to the motion was somewhat supplemented by affidavits and exhibits (Record, pp. 26-53), and some rea-

sons were advanced for the denial of the injunction which would not have been applicable on demurrer. It was claimed by defendants:

First: That the controversy was *res judicata*.

Second: That the granting of the injunction prayed for was prohibited by Section 265 of the Judicial Code, being section 720 of the revised statutes.

Third: That there was no equity on the face of the bill.

Fourth: That the bill should be dismissed because the complainant had failed to exhaust its remedies before the Michigan Railroad Commission; and

Fifth: That there was no Federal question involved.

The three judges considered it unnecessary to decide any of these questions except the first. They filed an opinion (reported in 203 Fed. 864) holding that the controversy was *res judicata*, and denying the injunction prayed for.

After this decision (the new equity rules having meanwhile gone into effect), the defendants supplemented their previous demurrers by motions to dismiss, based upon the same grounds. (Record, pp. 68-71.) The hearing on these motions has been suspended pending the decision by this Court of the present appeal, it being apparent that such decision may dispose of the entire controversy.

Appellant concedes the fact of similarity between its present bill and its bill previously filed in the State Court (Record, pp. 82, 60), and seeks to avoid the doctrine of *res judicata* solely upon the theory that the litigation in the State Court is to be considered as in the nature of a legislative investigation rather than a judicial proceeding. This is apparently the basis of each of the twelve paragraphs of the assignment of errors. (Record, pp. 74-76.)

At the time of the decision in the District Court this question had not been expressly determined by the Supreme Court of the State of Michigan. Since the decision of the District Court, however, this precise question has been twice passed upon by the Michigan Supreme Court, both opinions having been filed so recently that they have not yet been officially reported.

Detroit & Mackinac Ry. Co. vs. Mich. Railroad Commission, 144 N. W. 689 (Dec. 20, 1913.)

Michigan Railroad Commission vs. Detroit & Mackinac Ry. Co., 148 N. W. 385 (July 25, 1914.)

The first opinion was filed on a motion by the present

appellees to put into effect the rates in question, by amending the original decree. The motion was denied on the ground that the pleadings were not broad enough to justify this relief. The Court, however, overruled the contention of the railroad company that the previous proceedings in the State Courts had been legislative and not judicial, which is the precise contention made in the case at bar. In overruling this contention, the Michigan Supreme Court filed a well considered opinion, construing the statute and explaining the nature of proceedings under it. The following extracts are from this opinion:

> "These contentions, except the first and the last one, rest upon the proposition, asserted in argument, that the power exercised by the Court in the proceeding to review the action of the Michigan Railroad Commission is not judicial in character, and is exercised merely for the purpose of reviewing and of correcting the results of a similar exercise of power by the Michigan Railroad Commission. In short, that the action in Court was a mere continuation of the proceedings before the commission, the Court exercising no other or different powers from those exercised by the commission and addressing itself to the decision of no questions other than those decided by the commission. We are told that in filing its bill of complaint in the Circuit Court, in Chancery, and in appealing to this Court, the railway company was but pursuing a practice approved by the Supreme Court of the United States in Prentis vs. Atlantic Coast Line Co., 211 U. S. 210, preparatory to thereafter invoking the judicial authority to determine the lawfulness of the orders made by the Railroad Commission. * * * * * * *
>
> "In the case in which the pending motion is made the railway company availed itself of the right, given by the statute, to immediately review the orders of the commission in the Courts. The commission had established certain rates and practices. Its orders were in effect—were by the statute made effective—until set aside or the enforcement of them enjoined. They became immediately the foundation of private rights. The railway company addressed itself to the Circuit Court, in Chancery, for the County of Wayne, charging that the rates, etc., were unreasonable and confiscatory. It did not appeal from the commission to the Court, and the statute does not provide for an appeal. It prayed apparently for a judicial determination of its rights in the premises and introduced such testimony as it cared

to introduce. Its bill was dismissed. It appealed to this Court and here the decree of the lower Court was affirmed. Neither Court undertook to determine anything more than that it was not made out that the orders were unreasonable and confiscatory. On the contrary, it affirmatively appears that in both Courts it was recognized that in determining the reasonableness of charges and practices complained about, the commission may consider facts which Courts may not consider, and that the Court confined itself to a determination of the judicial questions presented, namely, whether the action of the commission was shown to be unreasonable or would, if enforced, result in confiscation of property. It is true that in the opinion of this Court the question whether the legislature had attempted to confer greater powers upon it was not discussed. In view of the previous decisions herein referred to it was unnecessary to advert to the subject. The proposition now advanced by the railway company receives no support from either of our decisions. What we have held is, in effect, that the legislation in question affords to parties in interest an immediate judicial review of the orders of the Michigan Railroad Commission and that the legislation will be held to impose, or confer, upon the Court the power and duty to determine whether the orders of the commission are reasonable and whether the rates fixed by it are so unremunerative as to be confiscatory. It is not manifest that the application of the legislation in question as so limited and the practice pursued deny to the railway company any constitutional right. Standard Oil Co. vs. Missouri, 224 U. S. 270; Oregon R .R. & N. Co. vs. Fairchild, 224 U. S., 510; Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362."

The second of the above decisions was based upon an application by the present appellees for a writ of mandamus compelling the railroad company to give immediate effect to the commission rates. The Court on this hearing granted the relief prayed for, holding that mandamus was the proper remedy, agreeing with the Federal District Court that the latter had no jurisdiction, and reiterating its former opinion in regard to the nature of the proceedings, as follows:

"We cannot accede to the claim of respondent that the proceedings had in the State Court were not judicial in nature. It has already been decided by this Court, as well as by the United States District Court

for the Eastern District of Michigan, in Equity, that the action of this Court in affirming the decree of the Wayne Circuit Court, in Chancery, as well as the action of that Court was not legislative, but was judicial in character."

The following are the important provisions of the State Statute, which is act number 300 of the Public Acts of Michigan of 1909.

"Sec. 26 (a) Any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within thirty days from the issuance of such order and notice thereof commence an action in the Circuit Court in Chancery against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed are unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable; in which suit the commission shall be served with a subpoena and a copy of the complaint. The commission shall file its answer, and on leave of Court any interested party may file an answer to said complaint. Upon the filing of the answer of the commission said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such Court, and the Circuit Court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and the Circuit Courts in chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the Courts shall decide to be in accordance with the facts and the law;

(b) No injunction shall issue ssuspending or staying any order of the commission, except upon application to the Circuit Court in chancery or to the judge thereof, notice to the commission having been given and hearing having been had thereon;

(c) If, upon the trial of said action, evidence

shall be introduced by the complainant which is found by the Court to be different from that offered upon the hearing before the commission, or additional thereto, the Court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said Court within ten days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order;

(d) Either party to said action, within sixty days after service of a copy of the order or judgment of the Court, may appeal to the Supreme Court, which appeal shall be governed by the statutes governing chancery appeals. When the appeal is taken the case shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or if no term is then pending, shall take precedence of cases of a different nature except criminal cases at the next term of the Supreme Court;

(e) In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be.

Sec. 27 (a) In all actions and proceedings in Court arising under this act all such process shall be served and the practice and rules of evidence shall be the same as in actions in equity, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil process shall execute any

process issued under the provisions of this act, and shall receive such compensation therefor as may be prescribed by law for similar services;"

The printed record has been filed in the case at bar, which makes it unnecessary to print as a part of this brief, any of the proceedings in the Court below.

ARGUMENT OF THE MOTION TO DISMISS.

No Federal Question Involved.

It is certain that the allegations of paragraph seven of the bill of complaint raise no federal question and give the District Court no jurisdiction.

Ross vs. Oregon, 227 U. S. 150, and cases there cited.

It seems almost equally plain that the other allegations of the bill do not state a cause of action arising under the constitution or laws of the United States.

Such a cause of action must necessarily "depend upon the construction and application of the constitution." It must involve such construction "actually and not potentially," and jurisdiction cannot be assumed on a mere hypothesis.

Defiance Water Co. vs. Defiance, 191 U. S. 184.

So far as concerns the past and present litigation, the failure of the railroad company to obtain relief has been due to lack of *evidence*. (See 171 Mich., pp. 362-364.) (Record, pp. 48-50.) Mr. Justice Day for this reason held that no federal question was raised. There is no certainty that any such question will be raised by any future litigation between the parties. If raised at any stage of the proceedings, complainant has its remedy by writ of error from this Court to the State Supreme Court under U. S. R. S. Sec. 709. Until it is so raised the Federal Courts have no jurisdiction.

This Court have said:

"Litigation in the State Courts cannot be dragged into the Federal Courts at such a stage and in such a way. The proposition is wholly untenable that before the state courts in which a case is pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the State Courts might so decide as to render their final action unconstitutional.

"Moreover, the state courts are perfectly able to

decide federal questions arising before them, and it is their duty to do so (citing cases), and we repeat the presumption is in all cases that the State Courts will do what the constitution and laws of the United States require (citing cases.) If error supervenes the remedy is found in Section 709 of the Revised Statutes."

Defiance Water Co. vs. Defiance (Supra) 191 U. S. 193-4.

U. S. R. S. Section 720. Judicial Code Sec. 265.

This section provides that (except in bankruptcy cases) "the writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a state."

This Court, while holding that the Federal Courts might enjoin the legislative or administrative acts of the rate making authorities, assumed that "proceedings brought to *enforce* the rate" * * * * *"would be proceedings in Court and could not be enjoined."*

Prentiss vs. Atlantic Coast Line Co., 211 U. S. 210, (pp. 226-228.)

The prayer for relief in the case at bar asks for an injunction to restrain all the defendants from *"enforcing or attempting to enforce by any action, proceeding or otherwise"* the orders of the commission. This is precisely what this Court say cannot be done.

Moreover, in the case at bar, the injunction is sought not only against the railroad commission as an administrative or legislative body, but also against the other individual defendants, *to prevent them from protecting their individual rights by judicial proceedings.* This is the precise evil which the Federal Statute is designed to prevent.

The statute applies not only to an injunction aimed at the State Court itself, but also to an injunction sought against a party seeking to prosecute his case in the State Court.

Whitney vs. Wilder (C. C. A. 5th), 54 Fed. 554.

Ry. Co. vs. Spalding (C. C. A. 9th) 93 Fed. 280.

Peck vs. Jenness, 7 How. 611 (625.)

Deal vs. Reynolds, 96 U. S. 340.)

See also,

Haines vs. Carpenter, 91 U. S. 254.

Argument of the Motion to Affirm.

The nature of the proceedings in the State Courts is indicated by a condensed summary of those proceedings with quotations from some of the pleadings, briefs, opinions, etc., found on pages 81-89 of the printed record in the present case. A mere reading of this summary discloses the frivolity of appellants' claim that these proceedings in the State Court were legislative rather than judicial in their nature. *Moreover, this question involves the construction of the State statute, and this statute has been construed clearly and decisively by the highest Court of the state.*

This Court will follow the decision of the State Supreme Court not only in *construing* a state statute, but also in *defining its application*, or *declaring its legal effect*.

Williams vs. Gaylord, 186 U. S. 157.
Middleton Natl. Bank vs. R. R. Co., 197 U. S. 394.
Knights Templars Co. vs. Jarman, 187 U. S. 197.
Hammond vs. Hastings, 134 U. S. 401.
Amy vs. Watertown, 130 U. S. 301.
Flanigan vs. Sierra Co., 196 U. S. 553.
Chase vs. Curtis, 113 U. S. 452.

The rule applies where the decision of the State Court is rendered during the pendency of the hearing in this Court.

Stutsman County vs. Wallace, 142 U. S. 293.
Metzer Motor Car Co. vs. Parrott (Apl. 6-1914) Adv. Op. 1913, p. 575.

The decisions of the Supreme Court of Michigan therefore completely dispose of appellant's case.

If this Court desire to further consider the merits of the question, argument is rendered almost unnecessary by the convincing reasoning of the learned judges who rendered the opinion in the Court below, supplemented, as their reasoning is, not only by the reasoning of the Michigan Supreme Court, but also by an opinion of the District Court of the Western District of Washington in a parallel case in which the decision of the three judges in the case at bar was cited and approved. The opinions in these four cases, viz:

D. & M. Ry. Co. vs. Mich. R. R. Com. 203 Fed. 864.
Puget Sound Ry. vs. Lee, 207 Fed. 860.
D. & M. Ry. Co. vs. Mich. R. R. Com., 141 N. W. 689.
Mich. R. R. Com. vs. D. & M. Ry. Co. 148 N. W. 385.

in themselves constitute a convincing brief in support of this motion.

In addition, we have the opinion of this Court in Oregon, etc., R. R. Co. vs. Fairchild, 224 U. S. 510 the application of which is explained by the opinion in the Puget Sound case above cited.

In addition, we may be pardoned for calling attention to a few of the salient points of difference between the Michigan statute and the statute of Virginia involved in the case of Prentis vs. Atlantic Coast Line, 211 U. S. 210, relied upon by complainant.

In the Prentis case the action of the commission had not been reviewed by any judicial proceeding and there was no provision in the state statute for any such review. The statute provided for a *legislative appeal* directly from the order of the commission to the Supreme Court of Appeals of the state. This appeal was not a judicial proceeding, and it was expressly so held. The commission were not required to certify the entire record, and the Supreme Court of Appeals could not receive any new evidence but could merely *examine so much of the proceedings as had been certified by* the commission, and "*substitute such order as in its opinion the commission should have made*" (p. 224.) All judicial proceedings in the other Courts of the State were expressly prohibited by the statute (pp. 224-225.) The railroad company was therefore barred from prosecuting the case as a *judicial proceeding* in any Court of the state, and plainly had the right to apply to the Federal Court as the only judicial forum that was open to it.

The complainant in the case at bar was not limited in its selection of remedies as was the complainant in the Virginia case. Our statute contains no provision for an *appeal* as such from the order of the commission. Section 26 does provide for the prosecution of certain proceedings to vacate the orders of the commission. These proceedings differ from those provided for by the Virginia statute in two respects; *first*, in that the remedy is permissive, not compulsory, and does not prevent the railroad company from selecting some other remedy in preference to that given by the statute; and *second*, because the proceeding referred to in Section 26 is a judicial proceeding to *vacate* the order of the commission as distinguished from a legislative *appeal* from that order. So far as concerns the first of these distinctions, the statute merely provides that any dissatisfied party in interest *may* commence an action, and there is no provision prohibiting the prosecution of any other action which

might otherwise be open to the aggrieved party. Section 46 expressly provides that "this act shall not have the effect to release or waive any right of action * * * * by any person for any right * * * * which may have arisen or which may hereafter arise under any law of this state," etc.

With respect to the second of the above distinctions, the remedy provided for in Section 26 is merely an ordinary chancery action with certain additional privileges which are given to the complainant principally to enable it to bring the action on for hearing more rapidly than it would otherwise be able to do. Suits brought under this section are given precedence, both in the Circuit and Supreme Courts. The reference back to the commission and the incorporation of its proceedings in the record are merely for the information and assistance of the Court and do not limit its powers. The final decree is based upon new and additional evidence submitted without limitation by both parties as in any other judicial proceeding. Even the issues to be raised are not limited to questions of fact bearing upon the propriety of the commission's orders, but the complainant is left at liberty to attack and if possible vacate the orders of the commission upon constitutional grounds, as the complainant attempted to do in the case under consideration. (R. pp. 82-89.) The bill of complaint was filed as an original bill under its own title and number in the Wayne Circuit Court, and not as an appeal from some other tribunal. The statute provides that "all such process shall be served and the practice and rules of evidence shall be the same as in actions in equity except as otherwise herein provided." (Sec. 27 a.) There is no provision in the act eliminating any of the characteristic elements of an ordinary chancery action.

When the complainant filed its bill in the Wayne Circuit Court, in Chancery, it was at liberty to select any Court and any form of proceeding that it might have selected if there had been no statute in force. It voluntarily selected the Wayne Circuit Court, and filed an original bill in Chancery, in the usual form, upon which process was issued, issue joined, much new testimony submitted upon all the issues now sought to be raised, and a judicial hearing had, followed by the entry of a judicial decree. An appeal was taken to the Supreme Court, not from the Commission's order, but from the judicial decree of the Wayne Circuit Court. The Supreme Court in affirming that decree acted judicially. *The question of claimed legislative confiscation was judicially raised in that case.* The legislative act of the

commission was *judicially attacked as confiscatory and in violation of the 14th amendment.* (Record, pp. 82-89.)

An attempt through the Courts to nullify legislation by ordinary legal process is not itself a legislative but a judicial proceeding. A decree entered in such a proceeding is plainly an adjudication of the rights of the parties, and is an absolute bar to a second judicial proceeding for the same purpose. There must somewhere be an end of litigation.

No Equity on the Face of the Bill.

The bill shows that complainant's contentions have been successively overruled by three separate tribunals; the Railroad Commission, the Wayne Circuit Court in Chancery, and the State Supreme Court, and after a full hearing on the merits in each case. That the orders complained of were made five years ago, and that the complainant has therefore during the last five years exacted from shippers many thousands of dollars to which it was not entitled and which it now holds unlawfully. It asks this Court to compel these shippers to continue the payment of these excessive rates, merely because it now again *offers* to prove what it has already *failed* to prove after full opportunity to do so. The hardship and embarrassment resulting to shippers from the tying up of their capital by the payment of excessive freight rates for the past five years is apparent. Complainant seeks to continue these conditions during the slow progress of this new litigation.

Even if the bill of complaint made a prima facie case, the result of the litigation in the State Courts so discredits complainant's claims as to justify a denial of injunctive relief until final hearing.

However, we do not desire a mere postponement of the question until final hearing, but seek the affirmance of the order below, upon grounds which will finally dispose of complainant's case and ensure the dismissal of its bill of complaint.

Respectfully submitted,

GRANT FELLOWS,
EDWARD S. CLARK,
Solicitors for Appellees.

Supreme Court of the United States

October Term, 1914.

No. 209.

DETROIT AND MACKINAC RAILWAY COMPANY,
Appellant,

vs.

MICHIGAN RAILROAD COMMISSION, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, FLETCHER PAPER COMPANY, AND FRANK R. GILCHRIST, WILLIAM A. GILCHRIST, GRACE GILCHRIST FLETCHER, AND RALPH E. GILCHRIST, EXECUTORS OF THE ESTATE OF FRANK W. GILCHRIST, DECEASED,
Appellees.

Brief for Appellant in Opposition to Motion to Dismiss, Advance, or Transfer to Summary Docket.

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Appellant.

DETROIT:
Record Printing Co., Free Press Bldg., 11-17 Lafayette Boulevard.
1914.

INDEX.

TABLE OF CITATIONS.

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STATEMENT OF THE CASE.

The Constitution of Michigan contains the following provision, (Art. XII, Sec. 7):

> "The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this state, and may pass laws establishing reasonable maximum rates of charges for the transportation of property by express companies in this state, *and may delegate such power to fix reasonable maximum rates of charges for the transportation of*

freight by railroad companies and for the transportation of property by express companies to a commission created by law; and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad."

The act creating the Michigan Railroad Commission was revised by a new act passed in 1909. *Michigan Public Acts*, 1909, *pp.* 704-733; 3 *Howells Mich. Stat. 2d., Anno. Ed. Secs.* 6524-6575.

The act is modeled after the Interstate Commerce Act.

The provisions of the act to be considered in this case are as follows:

Sec. 22 (a). Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty days after such notice has been given the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make the investigation, the commission shall give the said common carrier and the complainants at least ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. Such hearings may be continued from time to time in the discretion of the commission. *If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in*

the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof. All common carriers to which the order applies shall, on or before the date when such order becomes effective, make such changes in schedules on file as shall be necessary to make the same conform to such order, and no change shall within two years thereafter be made by any such common carrier in any such rates, fares or charges, or in any such joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the common carriers thereby affected in like manner, and the same shall take effect within such times thereafter as the commission shall prescribe;

(b) The commission may, when the complaint is made of more than one rate or charge, order separate hearings thereon, and may consider and determine the several matters complained of separately and at such times as it may prescribe. No complaint shall of necessity at any time be dismissed because of the absence of direct damage to the complainant;

(c) Whenever the commission shall believe that any rate or rates or charge or charges may be unreasonable or unjustly discriminatory, or that any service is inadequate, and that any investigation relating thereto should be made, it may, upon its own motion, investigate the same. Before making such investigation, it shall present to the common carrier a statement in writing, setting forth the rate or charge to be investigated. *Thereafter, on ten days' notice to the common carrier of the time and place of such investigation, the commission may proceed to investigate such rate or charge in the same manner and make like orders in respect thereto as if such investigation had been made upon complaint;*

(d) This section shall be construed to permit any common carrier to make complaint of like effect as though made by any person, firm, corporation or association, mercantile,

agricultural or manufacturing society, body politic or municipal organization;

(e) The commission may, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and the terms and conditions under which such through routes shall be operated when the common carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates: Provided, No reasonably satisfactory through route and joint rate exist. Whenever the common carrier or common carriers, in obedience to an order of the commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate, fare or charge to be received by each common carrier party thereto, which order shall take effect as part of the original order.

Sec. 23. * * * (d). A full and complete record shall be kept of all proceedings had before the commission on any investigation had under section twenty-two of this act and *all testimony shall be taken down by a stenographer appointed by the commission.* When any complaint is served upon the commission under the provisions of section twenty-six of this act the commission shall, before said action is reached for trial, cause the certified transcript of all proceedings had and testimony taken upon such investigation to be filed with the clerk of the Circuit Court of the county where the action is pending. *A transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, taken by the stenographer, certified by him to be a true and correct transcript of all the testimony on the* investigation or of a particular witness, or of any specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and transcribed shall be received in evidence with the same effect as if such stenographer were present and testified to the facts so certified. A copy of such transcript shall be furnished upon demand, free of cost, to any party to such investigations, and to all other persons on payment of a reasonable amount therefor.

Sec. 25. All rates, fares, charges, classifications and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission *shall be in force*

and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section twenty-six of this act, or until changed or modified by the commission as provided for in section twenty-four of this act.

Sec. 26 (a). Any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, *may within thirty days from* the issuance of such order and notice thereof *commence an action in the Circuit Court in Chancery against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed are unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable;* in which suit the commission shall be served with a subpoena and a copy of the complaint. The commission shall file its answer, and on leave of court any interested party may file an answer to said complaint. Upon the filing of the answer of the commission said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the Circuit Court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and *the Circuit Courts in Chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law;*

(b) No injunction shall issue suspending or staying any order of the commission, except upon application to the Circuit Court in Chancery or to the judge thereof, notice to the commission having been given and hearing having been had thereon;

(c) If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action

stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action and shall report its action thereon to said court within ten days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed: *if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance.* If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order;

(d) Either party to said action, *within sixty days after service of a copy of the order or judgment of the court, may appeal to the Supreme Court, which appeal shall be governed by the statute governing chancery appeals.* When the appeal is taken the case shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or if no term is then pending, shall take precedence of cases of a different nature except criminal cases at the next term of the Supreme Court;

(e) In all actions under this section the *burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be.*

On a chancery appeal the Supreme Court of Michigan hears the case *de novo*, and disposes of it precisely the same as if it had not been heard in the court below. 1 *C. L.* 1897, *Sec.* 553; 4 *Howell's Mich. Stat., Sec.* 12079.

Haines vs. Haines, 35 *Mich.*, 138, 143.
Kelly vs. Gaulker, 164 *Mich.*, 519, 531.

October 22nd and November 3rd, 1909, the Michigan Railroad Commission granted orders reducing the rates charged by the Detroit and Mackinac Railway for transporting logs in carload lots to the City of Alpena. (*Record, pp.* 15-18).

November 22nd, 1909, the Detroit and Mackinac Railroad Company filed a bill in the Circuit Court for the County of Wayne in Chancery to vacate and set aside said orders on the ground that the rates and charges fixed by them are unlawful and unreasonable. (*Record*, *p.* 2).

The suit so commenced was prosecuted in strict compliance with the statutory provisions to a decree in the Wayne Circuit, dismissing the bill. (*Record*, *p.* 2.)

An appeal was regularly taken to the Supreme Court of the state, where the decree below was affirmed. (*Record*, *p.* 2; 171 *Mich.*, 335.)

We endeavored to sue out a writ of error but Mr. Justice Day was of the opinion that the State Court had so far decided the facts against the railroad company, that there were no federal questions left that could be reviewed on a writ of error.

The Detroit and Mackinac Railway Company, then filed the bill in the present case, in which it attacks both the facts and law, as found by the Railroad Commission and affirmed by the State Courts. (*Record*, *pp.* 1-20.)

A motion for a preliminary injunction was heard before three federal judges under the recent statute; and they being of the opinion that the decision and decree of the Supreme Court of Michigan is *res adjudicata*, and conclusive and final, the motion was denied. (*Record*, *p.* 65).

Their opinion is in the *Record*, *pp.* 56-64. The Railroad Company took and perfected an appeal to this Court. (*Record*, *pp.* 72-78).

The assignment of errors is on *p.* 74.

The vital question in the case is whether the decision and decree of the Supreme Court of Michigan, is *res adjudicata*.

Our assignment of errors present the different aspects of that question; and as all the errors assigned are relied on, we here insert them in full.

ERRORS RELIED ON.

1. The court, consisting of the three judges who heard and determined the motion for an injunction,

erred in refusing to grant the injunction prayed, and in denying said motion.

2. The court erred in taking jurisdiction of the question whether the powers conferred upon the state courts by the act creating the Michigan Railroad Commission, (No. 300 Public Acts of Mich., 1909, pp. 704-733), to review the orders of the commission are under the constitution of Michigan, judicial and not legislative.

3. The court erred in refusing to hold that the powers conferred upon the state courts by said Act, are legislative powers and not judicial.

4. The court erred in refusing to hold that the Federal courts should determine for themselves whether any given action of a state government is legislative or not by considering the nature of the power exercised and should not allow that question to depend upon which one of the three departments of the state government took the action called in question in any case.

5. The court erred in refusing to hold that there is nothing in the constitution of the United States, which prevents a state from commingling the powers of government, either by constitutional provision, by legislative enactment, or by judicial decision.

6. The court erred in refusing to follow the decision and instruction contained in the opinion of the court by Mr. Justice Holmes in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, and in practically overruling that case, by untenable efforts to distinguish it from the present case.

7. The court erred in holding that the said decision of the state Supreme Court, affirming the decree of the Wayne Circuit Court in Chancery, is *res adjudicata*, and conclusive and final.

8. The court erred in holding that the complainant voluntarily invoked the judicial power of the state courts, when it is apparent on the face of the record, that the complainant filed his (it's) bill in the Circuit Court of the county of Wayne, in Chancery, in obedience to the requirements imposed upon it by the Supreme Court of the United States in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210.

9. The court erred in ignoring the fact that the said act of the State Legislature confers the same powers on the state courts as those exercised by the Michigan Railroad Commission, and that the Supreme

Court of the state has already held that the powers conferred on the commission are not judicial powers. *Michigan Central Railroad Co. vs. Michigan Railroad Commission*, 160 *Mich.*, 355.

10. The court erred in holding that the constitution of Virginia is so essentially different from the constitution of Michigan that the decision of the Supreme Court of the *United States in Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, is not a binding authority in the present case.

11. The court erred in overlooking the fact that the constitution of Michigan is identical with the constitution of Virginia, the only difference being that the constitution of Virginia creates a state corporation commission, and the constitution of Michigan provides that such a commission may be created by law, and that the power conferred on the state court or courts to review the orders of the commission and to make such orders as the commission ought to have made is the same in both states.

12. The court erred in assuming that if the state conferred upon its judicial department the entire rate making power, from start to finish, the findings of fact of that department would be conclusive and final, and beyond review by the Federal judiciary; and that thereby the due process of law clause of the Fourteenth Amendment of the constitution of the United States would be suspended, as far as the facts of any case were concerned.

I.

The first question to be considered in this case is whether there is any material difference between the Virginia State Corporation Commission law and the Michigan Railroad Commission law.

There are some slight differences but they are not important or material.

The whole of the Virginia law is in the constitution of the state adopted in 1902. Art. XII.

The Michigan law is partly in the State Constitution and partly in an Act of the State Legislature.

We have already set forth in this brief the provisions of the Michigan law and we will now set forth the provisions of the Virginia law.

CONSTITUTION OF VIRGINIA, 1902.

Art. 12, Sec. 156:

(b) * * * Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, *and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon*, to the end that justice may be done and shall have process to enforce the attendance of witnesses;

(d) From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in sub-section c of this section, *an appeal* (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) *may be taken by the corporation whose rates*, charges or classifications of traffic, schedule, facilities, conveniences or service, are affected, or *by any person deeming himself aggrieved by such action*, or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for ap-

eals from any other action of the commission, by the Commonwealth or by any person interested, irrespective of the mount involved. *All appeals from the commission shall be the Supreme Court of Appeals only;* and in all appeals to hich the Commonwealth is a party, it shall be represented the Attorney-General or his legally appointed representative. No court of this Commonwealth (except the Supreme ourt of Appeals, by way of appeals as herein authorized), hall have jurisdiction to review, reverse, correct or annul ny action of the commission, within the scope of its authority, or to suspend or delay the execution or operation hereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, however, that the writs of mandamus and prohibition shall lie om the Supreme Court of Appeals to the commission in all ases where such writs, respectively, would lie to any inferior ibunal or officer.

(f) In no case of appeal from the commission shall any ew or additional evidence be introduced in the Appellate ourt; but the chairman of the commission, under the seal f the commission, shall certify to the Appellate Court all acts upon which the action appealed from was based and hich may be essential for the proper decision of the appeal, ogether with such of the evidence introduced before, or considered by, the commission as may be selected, specified and equired to be certified, by any party in interest, as well as ch other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, henever an appeal is taken therefrom, file with the record f the case, and as a part thereof, a written statement of he reasons upon which the action appealed from was based, nd such statement shall be read and considered by the appellate court, upon disposing of the appeal. *The appellate ourt shall have jurisdiction, on such appeal, to consider and etermine the reasonableness and justness of the action of he commission appealed from, as well as any other matter rising under such appeal;* provided, however, that the action f the commission appealed from shall be regarded as prima acie just, reasonable and correct; but the court may, when deems necessary, in the interest of justice, remand to the ommission any case pending on appeal, and require the ame to be further investigated by the commission, and reorted upon to the court (together with a certificate of such dditional evidence as may be tendered before the commission y any party in interest), before the appeal is finally decided.

(g) Whenever the court, upon appeal, shall reverse an

order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, *it shall, at the same time substitute therefor such order as, in its opinion, the commission should have made* at the time of entering the order appealed from; otherwise, the reversal order shall not be valid.

Comparing the Michigan law with the Virginia law, it is plain that they are in substance and legal effect the same. They differ in matters of form and detail, but in no particular is the difference significant or of any importance.

1. It is of no consequence that the whole Virginia law is in the State Constitution and the Michigan law is partly in the constitution of the state and partly in an act of the legislature. In either form the several sections and provisions show what the law of the state is.

2. It is not material that the Virginia law provides for a direct appeal from the Corporation Commission to the Supreme Court of Appeals, and the Michigan law provides that the review of the orders of the Commission shall be first by a bill filed in a subordinate court and then by appeal to the Supreme Court of the State.

To say there is a substantial difference is a mere play upon words.

3. It is of no importance that the Michigan law requires the subordinate court, if any evidence introduced by the complainant before it is different from that offered upon the hearing before the Commission or is additional thereto, to transmit the same to the Commission for further consideration of its order, and a report thereon to the court, and the Virginia law provides that the Supreme Court of Appeals may, when it deems necessary in the interest of justice, remand the case to the Commission for further investigation and a report to the court.

The Michigan law requires the subordinate court to receive different or additional evidence, and the Virginia law permits it to be done, when the court deems it necessary.

4. Nor is it of any consequence that the Michigan law provides that Circuit Courts in Chancery and the Supreme Court on appeal shall have jurisdiction "to affirm, vacate or set aside the order of the Commission in whole or in part and to make such other order or decree as the courts shall

decide to be in accordance with the facts and the law," and the Virginia law provides that the "appellate court shall have jurisdiction to consider and determine the reasonableness and the justness of the action of the Commission appealed from," and "whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges or classification of traffic of any transportation or transmission company it shall at the same time substitute therefor, such order as in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid."

The Virginia law is the more positive but the legal meaning of both is the same, namely, that the court is to act in the same capacity as the Commission to the extent of making such order as the Commission on the facts and the law should have made.

II.

Without regard for any weight to be given to the case of *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, there are cogent and convincing reasons why the decision of the Supreme Court of Michigan, on the appeal to it, in this case, should not be held to be *res adjudicata*.

1. The Detroit and Mackinac Railway Company did not invoke the general equity jurisdiction of the Circuit Court for the County of Wayne, that is to say, it did not invoke the judicial power of the State Courts. What it did do, was to invoke the power and authority of the courts in virtue of the special statutory proceedings authorized by the Act.

The record shows that it filed its bill in the Wayne Circuit "within thirty days from the issuance of such order and notice thereof," that the case proceeded in the Wayne Circuit and in the Supreme Court as a case under the special statute.

The evidence introduced in the Wayne Circuit was transmitted to the Commission and its report thereon received, and the Supreme Court based its decision on that report and the provision of the special act, that the rates fixed by the Commission

> "shall be prima facie, lawful and reasonable until finally found otherwise, in an action brought for the

purpose *pursuant to the provisions of section twenty-six of this Act.*"

We quote the following from the opinion of the Supreme Court of Michigan as found in this Record at p. 35-6, and as reported, 171 *Michigan*, 346-7:

> "The duty of the courts in the premises is not essentially different from that of the commission. No different conclusion was stated in *Michigan Central R. Co. vs. Wayne Circuit Judge*, 156 *Mich.*, 459 (120 N. W., 1073, 16 Am. & Eng. Ann. Cas., 832). It is only after determining that the rate fixed by the Commission is unreasonable that the court may set it aside. Presumptively, the findings and orders of the Commission are right. If attacked, the complainant has the burden of showing 'by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be.'
>
> "The difficulty and perplexity of such an inquiry would deter anyone, to whom the task was not a duty, from pursuing it, in the first instance, and from reviewing a determination once made. It is unfortunate that the courts do not have the assistance which would be derived from a finding made by the commission which would distinctly state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable. We notice, in this connection, that in returning the testimony to the Circuit Court the Commission states that its original conclusions are confirmed by a *personal examination of the locality in which the service of complainant is performed and by knowledge acquired independent of the testimony produced before it. Manifestly, this Court cannot share in knowledge so acquired unless evidence of the facts discovered, or supposed to have been discovered, is in some way brought upon the record.*"

In the case cited of *Michigan Central R. Company vs. Circuit Judge*, 156 *Mich.*, 459, the Court at p. 470 said:

> "We do not construe the provisions of this Act to lodge in the courts the power to establish rates. The power conferred upon the courts is solely to determine whether the rates are confiscatory or unreasonable. If the courts should so find, they are not authorized

> to determine what are reasonable, but the matter must be again referred to the Commission to establish other rates. If they are found to be reasonable, the courts will sustain the action of the Commission. If, however, it should be determined that such power was conferred upon the courts and is unconstitutional, the Act would still be held valid, because it could stand with that clause eliminated from the statute."

This was quoted and reiterated in the case cited by the earned counsel for the appellees in their brief in support of heir motion to dismiss, etc., of *Detroit & Mackinac Railway Company vs. Mich. R. Commission*, 144 *N. W.*, 689, 691, *near ottom of first column*.

All of which means that the Supreme Court of Michigan ccepts and adopts the ruling of the Supreme Court of the nited States in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 10, and *Louis. & Nash. R. Co. vs. Garrett*, 231 *U. S.*, 298, hat fixing rates for the future is a legislative and not a udicial function.

2. The Detroit & Mackinac Railroad Company did not nvoke the power conferred on the State courts by the special ct to fix rates for the future by making

> "such other order or decree as the courts shall decide to be in accordance with the facts and the law."

The bill filed by the company in the Wayne Circuit was

> "to vacate and set aside said orders of the Commission of October 22, 1909, and November 3, 1909, on the ground that the rates and charges fixed by said orders are unlawful and unreasonable" (*Record*, p. 2).

The bill did not pray that in case the orders of the Com- ission were vacated and set aside, that the Court should ix such rates as it found to be in accordance with the facts nd the law. Nor did the Railroad Commission in its answer ray for any such relief. All it asked was that

> "its orders in the premises may be affirmed and the bill of complaint filed herein dismissed."

The Commission did not pray for any affirmative relief; ot even for an order directing the railroad company to put he rates of the Commission into effect (*Detroit & Mackinac*

Railway Company vs. Michigan Railroad Commission et al., 144 *N. W.*, 689).

Counsel for appellees cite that case in support of the motion to dismiss, etc., and we assume we have a right to make this use of it.

It is obvious that the question whether the State courts have power to fix rates for the future cannot arise in any case, unless they vacate and set aside the rates fixed by the Commission.

All they did do in this case was to affirm the orders of the Commission and dismiss the bill of complaint. The special statutory power of the courts to fix rates was not invoked and was not exercised; in fact, it was held non-existent.

The decision of the Supreme Court of Michigan, that the State courts have no power to fix rates, must be regarded as a correct construction of the constitution and laws of the State, and as it is in accord with the definitions of the Supreme Court of the United States of the legislative and judicial powers, the correctness of the decision cannot be questioned by anyone.

But it does not follow that when the State courts refuse to disturb the rates fixed by the Commission, and affirm its order, on an appeal to them under and in strict compliance with the special statutory provisions of the Railroad Commission Act, that the decision and decree of the Court are to be regarded as a final and conclusive adjudication of the facts on which the Commission acted.

The purely legislative action of the Railroad Commission is allowed to stand as far as the special statutory proceeding is concerned, and the facts on which the action of the Commission is based are not affirmed or adjudicated.

This is shown by the quotation we have made above from the opinion of the Supreme Court of Michigan, in this record at pp. 35-6 and reported 171 *Mich.*, 346-7.

And it is also shown by the opinion of the Court, 144 *N. W.*, 692, where the Court said:

"On the contrary, it affirmatively appears that in

> both courts it was recognized that in determining the reasonableness of charges and practices complained about, the *Commission may consider facts which the courts may not consider.*"

How can a decision and decree be considered *res adjudicata* and final of facts not made known to the Court and not considered by it?

3. The proceedings before the Michigan Railroad Commission were legislative proceedings; they were only *quasi* judicial, and the issue to be determined in the resort to the State Courts was not the same as that presented and tendered by the bill of the railroad company in the District Court of the United States for the Eastern District of Michigan.

The bill in the Federal Court raises the question: *What are the actual facts of the case?* No such question was before the State courts. There the issue was whether the railroad company with the burden of proof resting upon it had shown "by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable." And that question was disposed of by the Court by assuming that the testimony introduced by the railroad company to sustain the issue on its part was met, overcome and counterbalanced by *ex parte*, secret and undisclosed evidence, which was not introduced before the Commission, was not made known to the railroad company to enable it to rebut and refute the same, and was not brought into the record or otherwise made known to the Court.

It may have been, and probably was, the fact that no evidence whatever was introduced before the Commission tending to show that the rates the Detroit & Mackinac Railway Company was charging for the transportation of logs to Alpena were unreasonable and that the action of the Commission and of the courts was wholly based on *ex parte*, secret and undisclosed evidence in violation of due process of law clause of the Fourteenth Amendment of the Constitution of the United States as expounded by this Court in *Int. Com. Comm. vs. Louis., Nash. R. Co.*, 227 *U. S.*, 91, 93, and in other cases.

This is a question that may more properly and fully be considered on a writ of error to review the judgment of the Supreme Court of Michigan in the mandamus case of *Michigan Railroad Commission et al. vs. Detroit & Mackinac Rail-*

road Company, 148 *N. W.*, 385, cited by the learned counsel for the appellees in their brief in support of the motion to dismiss, etc.

We can only say at this writing that we are about to apply for the allowance of a writ of error to review and reverse that judgment.

What we insist upon now is that it is manifest upon this record that the issue before the State courts and the issue in the case in the District Court of the United States are not the same and that the State decision is not *res adjudicata*, and that whatever may be the final result, the questions presented by the record before the Court are serious and important enough to preclude a dismissal of the appeal, or an affirmance of the order below.

As to advancing the case or putting it on the Summary Docket, we will have something to say at the close of this brief.

III.

The importance of this case arises from the fact that under the instruction of the Supreme Court of the United States in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, counsel in this and in other like cases in Michigan and other States as they arise, are compelled before filing a bill in the Federal Court, to first resort to any special statutory proceedings, provided by the constitution or laws of the State for the review of the action of a railroad or corporation commission fixing rates.

In the Prentiss case the decree below in favor of the plaintiffs was reversed, but as there was a question whether it was not too late to take an appeal from the corporation commission to the Supreme Court of Appeals; and, therefore, the opinion of the Court by Mr. Justice Holmes concludes as follows:

> "If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the Commission affirmed, the bills may be dismissed without prejudice and filed again" (211 *U. S.*, 232).

This ruling of the Court was accompanied with the following, found on p. 230:

> "If the rate should be affirmed by the Supreme Court of Appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of *res adjudicata*. It will not be necessary to wait for a prosecution by the Commission. We may add that when the rate is fixed a bill against the Commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a State, and will be the proper form of remedy."

There is a still more serious difficulty. At another place in the opinion it is said that a State cannot be said to have fixed a rate until the last body having a say in the matter has acted, so that if the decision of that body under a special statutory proceeding for a review is *res adjudicata* of the facts, the Constitution of the United States and the jurisdiction of the Federal Courts are both suspended and held for naught under the rule that on a writ of error to a State court, the facts cannot be inquired into.

Justice Holmes, referring to that matter for the Court, said:

> "If the railroads were required to take no active steps until they could bring a writ of error from this Court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. *But the determination as to their rights turns almost wholly upon the facts to be found.* Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, *depend upon what the facts are found to be.* They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent."

The decrees of the State Courts in the present case affirming the orders of the Railroad Commission, did nothing more than to leave the legislative action of the Commission in full

force and effect. The State courts simply refused to disturb that action or the facts or alleged facts on which it was based.

The Detroit & Mackinac Railroad Company in its bill in the Federal Court, does not attack the action of the State courts; it does attack the legislative action of the Railroad Commission, on the facts; and as to those facts it has a right to be heard; for, if it has no such right it is denied the protection secured to it by the Constitution of the United States.

We respectfully submit that the motion to dismiss or affirm should be denied.

As to the motion to advance or place on the Summary Docket, we have this to say: We have no objection to either course being pursued, provided Case No. 360, on the present docket, and the case on the writ of error to Supreme Court of Michigan to review the judgment of that Court granting a writ of mandamus to forthwith put these very same orders into effect (if the writ is allowed), are also advanced to be heard at the same time.

We make this further proposition, which is properly addressed to the counsel for the appellees, that we are willing to submit all of these three cases, to the Court on briefs by the 15th day of January, 1915. All of these cases concern the same general controversy, different features of the same case, and the Court as well as counsel should not be required to go over the matters in dispute more than once.

That careful examination and adherence to the record in the cases submitted to it, for which the Supreme Court of the United States is noted, cannot be facilitated by oral argument in these cases.

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Appellant.

[redacted]

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. 203.

[redacted]

DETROIT & MACKINAC RAILWAY COMPANY,
Appellant,
vs.
MICHIGAN RAILROAD COMMISSION ET AL.,
Appellees.

[redacted]

[redacted]

[redacted]
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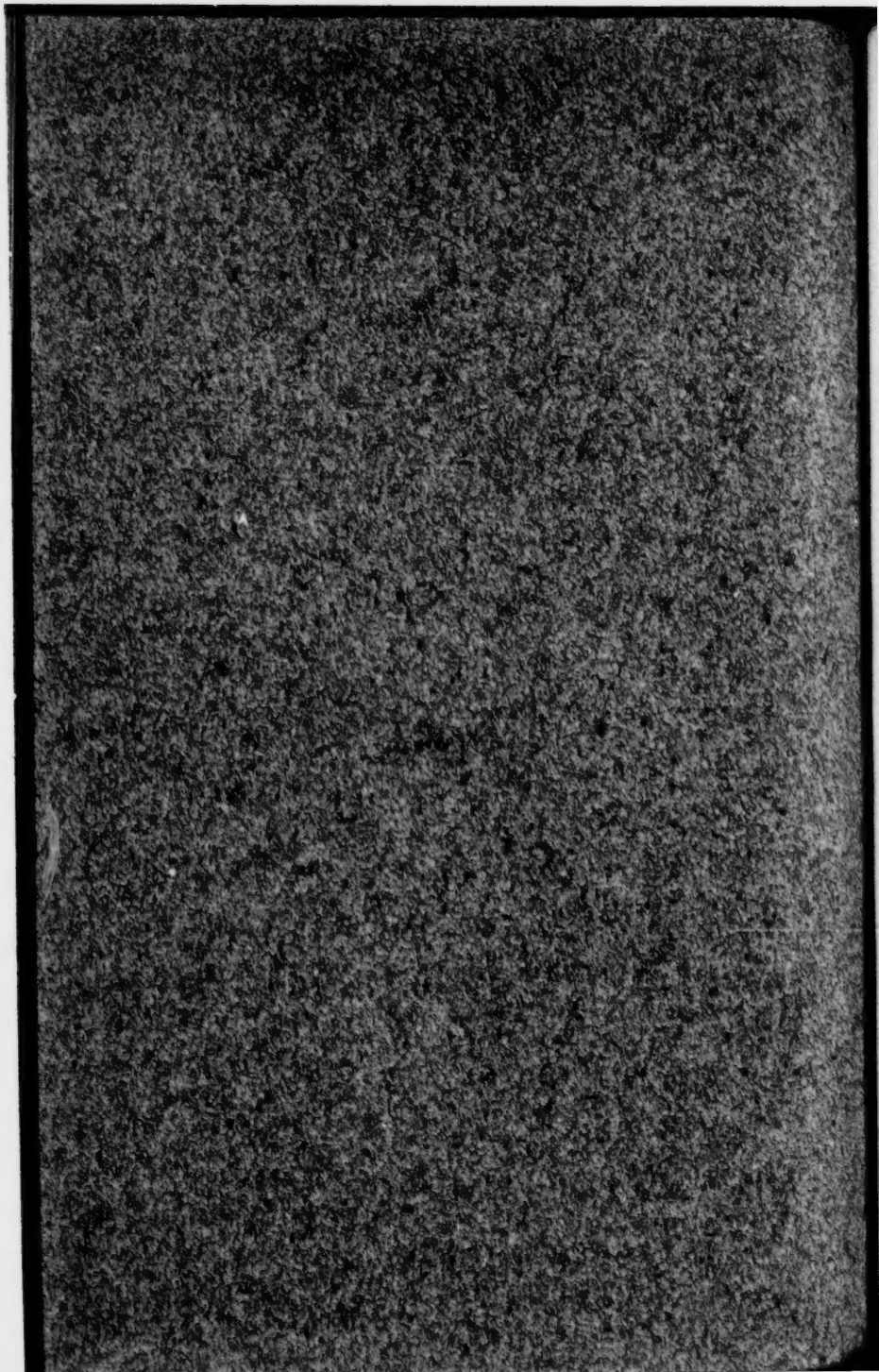

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 209.

DETROIT & MACKINAC RAILWAY COMPANY,
APPELLANT,
vs.
MICHIGAN RAILROAD COMMISSION ET AL.,
APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

An important question in this case is whether the Michigan Railroad Commission and the State courts ever had, or ever acquired, jurisdiction to grant or to enforce the orders of the Commission of October 22 and November 3, 1909, reducing the rates of the Detroit and Mackinac Railway Company for the transportation of logs from the logging tramways of the Alpena lumbermen to the city of Alpena.

This question of jurisdiction involves two different propositions: (1) The tramways in question are mere private conveniences, resting in private contracts, are not charged with a public interest, and are not subject to governmental control; (2) there never has been any complaint made, or

any charge formulated by the Commission, that the rates of the railroad company for the transportation of logs from the tramways to Alpena were unreasonable.

These are extraordinary statements of fact, but they are fully justified by this record:

I. *The Private Nature of the Tramways.*—The question whether the logging tramways are subject to governmental control was distinctly raised in its bill, as amended, filed by the railroad company in the circuit court for the county of Wayne.

Part of that bill appears in the record in this case at pages 82-84. Among other averments the bill contains the following:

> "This complainant has been advised and respectfully submits that the said logging spurs and branches and its rates and charges thereon are not within the jurisdiction or powers of the Michigan Railroad Commission or of the Legislature of Michigan, or of the Interstate Commerce Commission, or the Congress of the United States, and the orders of the Michigan Railroad Commission complained of in this case and dated October 22, 1909, and November 3, 1909, and October 19, 1909 (Exhibits 1, 2, and 3 of the bill) would, if enforced, deprive this complainant of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."

The nature of the logging tramways, the circumstances and contracts under which they were agreed upon and built, are set forth in the 13, 14, and 15 paragraphs of the present bill (Record, pp. 8-10).

We call attention to the following facts:

(1) The patches and tracts of hardwood and hemlock timber owned by the different lumbermen varied in area and the amount of timber thereon.

(2) The lumbermen acquired and owned the rights of way and did not convey the same to the railroad company.

(3) The lumbermen also did the grading and furnished the ties.

(4) All the railroad company did was to furnish the rails and lay them, and do what little ballasting was necessary.

(5) Whether the railroad company would furnish and lay the rails, depended on the amount of timber the lumberman had to haul and the length of time in which he would cut his timber and have it hauled.

(6) Each lumberman owned and controlled his own tramway and if any other timber owner or lumberman desired to make use of it, the terms on which he could do so was a matter of contract between them, for a money compensation or the like use of a tramway.

(7) The railroad company did no business as a common carrier on the tramways; there was no public or population tributary to them; no public freight or passenger service, no regular trains, and no regular train for the logging service.

(8) The tramways were not built for any regular traffic and were not capable of being used for regular traffic.

(9) When the timber of a lumberman was exhausted the railroad company would take up the rails and use them for some other private tramway.

(10) The tramways were temporary structures and no part of the public or statutory railroad of the company and were so regarded by the company and by the lumbermen.

(11) The compensation the railroad company received for hauling logs from the tramways to Alpena was a matter of agreement between the different lumbermen and the company. In November, 1908, a rate of $3.00 a thousand was agreed upon for points north of Alpena as far as Millersburg, and $3.25 beyond Millersburg.

(12) Inasmuch as the rates so agreed upon included the service on the main line of the railroad, the company filed a tariff with the Commission, specifying said rates. It is tariff M. C. R. 205, a copy of which is Exhibit C of the bill (Record, pp. 18-20).

It was not filed with any intention to subject the tramways or the service thereon to the jurisdiction of the Commission. (See 19th paragraph of bill, Record, pp. 11-12.)

The Supreme Court of Michigan (Record, pp. 32-33) had some difficulty in bringing the service on these logging tramways or branches within the Railroad Commission act, which contains this proviso:

> "*Provided*, That the provision of this act shall not apply to any logging or other private railroad not doing business as a common carrier."

The court said:

> "Much may be said in favor of the proposition that any railroad ought to be permitted to build or operate temporarily and by private arrangement a branch line for the convenience of a patron without subjecting its agreement or its performance thereof to public supervision. Contrariwise, it is apparent that a railroad might in this way greatly prefer an individual or company over others similarly situated."

The court then goes on to hold that the Detroit & Mackinac Railway Company is a common carrier, and does business as a common carrier, and "its branch lines have been laid and operated for the convenience of timber owners, it is true, but for the convenience of all of them whose timber was so conveniently reached by the branch."

The court ignored the fact that the logging tramways are privately owned and controlled, and that the railroad company only owns the rails, and that the private owners had and exercised the right to fix the terms on which any other timber owner would be permitted to make use of his tram-

way. It would be difficult to make a more exact definition of a private railroad.

The fear of discrimination is a far-fetched argument. The Alpena lumbermen are in business in competition with each other. The cost of felling the trees and sawing them into logs, wherever their timber is situated, is the same, and the mileage basis adopted by the Commission is itself discriminatory.

To avoid that or any other discrimination, the rates agreed upon were a uniform rate of $3 a thousand as far north as Millersburg and $3.25 a thousand beyond Millersburg. This is what the Alpena lumbermen requested, and their reason was that it put each and every of them on an even keel.

In the 18th paragraph of the bill (Record, p. 11) a tabulation is made showing the difference at eleven stations between the contract rates, the main-line rates adopted by the Commission, and the resulting tramway rates on the mileage basis.

The average of the contract rates is $3.16; of the main-line rates, $2.06, and of the tramway rates, $1.10.

This shows that the rates fixed by the Commission are on the average $1.10 per thousand feet of logs lower than the rates agreed upon by private contract.

The table also shows that the rates the Alpena lumberman would pay for the whole service to Alpena would vary from $1.33 to $2.33 per thousand, which must be a very great advantage to those getting the lower rates.

On the other hand, it is obvious that a difference in rates might be very desirable. Suppose a timber owner had a small body of timber at considerable distance from the main line, and desired a tramway which would involve a greater outlay than usual for rails and ballasting on the part of the railroad company, which would be loth to undertake its part of the work unless it received a higher rate than on tramways more favorably located, would it be improper or unlawful for the parties to agree on a higher rate?

This shows the practical utility of the proposition that matters of this kind—this kind of service—should be allowed to rest in private contracts, and should not be subject to any governmental regulation or control as long as that part of the rates agreed upon for the main-line service was in strict compliance with the published tariffs for main-line service.

II. *No jurisdiction was ever acquired by the Railroad Commission or by the State courts over the rates in question.*—After setting up the agreement of November, 1908, between the Alpena lumbermen and the railroad company, fixing a uniform rate of $3.00 as far north as Millersburg and $3.25 beyond Millersburg, the bill of complaint in the bottom clause of paragraph 15 (Record, p. 10) makes the averment that—

> "No complaint was ever made to your orator or to the Michigan Railroad Commission by any of the Alpena lumbermen that the rates so agreed upon were unreasonable or in any way excessive."

The 17th paragraph of the bill (Record, p. 10) shows that the complaint that the railroad company discriminated in its rates in favor of Cheboygan and against Alpena was met by the action of the company in putting the Alpena rates in force for Cheboygan. Then follows this averment:

> "That the Michigan Railroad Commission, without receiving any other complaint and without making any charge or statement on its own initiative, as required by subsection C of section 22 of said act of the State legislature, proceeded to investigate the question whether the rates of $3.00 and $3.25 on mixed logs, which were being received by your orator, were unreasonable, and against the protest and objections of your orator granted its said orders of October 22 and November 3, 1909."

These averments are a direct attack upon the jurisdiction of the Michigan Railroad Commission to grant the orders in question and on the ground that there has been no charge

or accusation against the railroad company that its rates for hauling logs from the tramways to Alpena are unreasonable.

Without such a charge, and notice thereof, or a hearing thereon, or an opportunity to be heard, the Michigan Railroad Commission had no jurisdiction or authority to grant said orders.

Want of jurisdiction can be shown by facts appearing in the record in the cause, or by extrinsic evidence of facts *aliunde* the record.

Our proofs in this case, when we get to the hearing in the District Court of the United States for the Eastern District of Michigan, will consist of the record of the proceedings before the Michigan Railroad Commission, and in the State courts, and such additional evidence as we may be permitted to introduce.

We will show that there was no charge, no notice, and no hearing, and, in addition, *no evidence* that the logging tramways were of a public nature, or that the rates of the railroad company were unreasonable, except such evidence as was obtained by the Commission, by *ex parte* investigations conducted when the case was first being considered by them before the orders were granted, and after they were granted and the Commission made its report to the Wayne Circuit Court.

The railroad company did introduce in the Wayne Circuit Court clear and satisfactory and indisputable evidence that the logging tramways are private and not public conveniences, and that the rates agreed upon by the private contracts and received by the company are reasonable.

This evidence was regarded by the State Supreme Court as not sufficient to overcome the secret and undisclosed evidence on which the Commission acted, and which was not brought before the Courts, and constituted the evidence which it was held the Commission could consider but the courts could not.

In New Jersey they have a State Board of Assessors, with power to determine the value of railroad property for the purpose of taxation. A full hearing before the board is given, with a right of review in the Supreme Court of the State, and on appeal from that court to the Court of Errors and Appeals.

In *Long Dock Co. vs. Hendrickson et al., State Board of Assessors, 85 N. J. L., 536*, the Supreme Court, citing some previous cases, said:

> "These cases are authority for the proposition that this court will not in settling the question of fair value, oppose its judgment to that of an administrative board, entrusted by law with the duty of fixing the fair value or market value of land for the purposes of assessing the same for taxes, where there is testimony before the board, the weight and value of which it is required to determine, to *which the members of the board may add their individual personal knowledge and judgment.*"

The attitude of the New Jersey Supreme Court coincides with that of the Supreme Court of Michigan in the present case.

The decision of the Supreme Court of New Jersey was reviewed by the Court of Errors and Appeals in an opinion by Justice Swayze, November 16, 1914, and the decision of the Supreme Court was reversed.

We quote from an account of the case in the New York *Sun:*

> "One of the important declarations made by the Court of Errors is that the members of the State Board of Assessors, even though they be regarded as a judicial body, may be subjected to cross-examination as to their personal knowledge of the value of railroad property where that knowledge is used in determining an assessment. The court shows, for example, that in the case of the Long Dock Company, the testimony of experts called by both sides was practically the same as to the value of the property.

To this value the assessors added 20 per cent, or about $1,000,000. Commenting upon this the court says:

"'There was no evidence to support this addition, since the court did not even assume that members of the board possessed knowledge not possessed by the experts, but spoke only of considerations probably within the personal knowledge of the assessors, a probability that was, at best, conjectural, since the assessors refused to disclose whether or not they had any means of knowledge or familiarity with the property they were valuing.'

"*Highly Technical Question?*—The question of value of railroad property is a highly technical one for experts, and the State had, in 1909, for the information of the people of the State and the State Board of Assessors, as the preamble of the legislative resolution declares, employed such experts. There was no presumption in the mind of the Legislature that members of the board would know more than the experts, and the court ought not to assume such to be the fact without proof.

"In disposing of the contention that as a judicial body the assessors could not be compelled to testify, the court points out that the Legislature, by providing for a review by the court of the amount of the tax and the excessiveness or insufficiency of the assessment, has by the necessity of the case provided for the taking of testimony of members of the board, since there cannot be such review unless all the facts before the board are presented to the court."

We do not vouch the truth of this report, but submit it subject to correction when the opinion appears in the *Atlantic Reporter*.

The fact that the Michigan Railroad Commission acted upon *ex parte* investigations and personal examinations and knowledge, was a very strong and conclusive reason why the Supreme Court of Michigan should have vacated the orders of the Commission instead of holding it was a sufficient reason for affirming the orders of the Commission.

And we think it is an equally conclusive reason why the decision and decree of the Supreme Court of Michigan should not be regarded as *res adjudicata*.

The orders of the Michigan Railroad Commission were without authority or jurisdiction, and as mere fiats of the Commission they are void, and the affirmance of the orders by the State Courts could not give them validity.

II.

The court composed of the three Federal judges had no jurisdiction to render a final decision that the opinion and decree of the Supreme Court of Michigan is *res adjudicata* and conclusive, and for two reasons:

1. The only question submitted to them under the statute, was whether on the case made by the bill, and the affidavits, and exhibits submitted by the defendants, the motion for an injunction *pendente lite* should be granted.

That was a mere interlocutory question, and no appeal would lie to this court except for the provisions of the statute permitting it.

And the jurisdiction of this court on this appeal is limited in the same way.

The question is, Should a preliminary injunction, until the final hearing and decree, be granted?

2. Under the allegations of the bill, the orders of the Railroad Commission and the decrees of the State courts affirming them are void, and the Detroit and Mackinac Railway Company cannot be deprived of the opportunity of proving the allegations of its bill to be true.

We would not have appealed from the order denying the injunction if we had not been in fear that the opinion of the three judges would be regarded as the "law of the case" in all subsequent proceedings.

And, as it was, we would have gone on with the case if Judge Tuttle, of the District Court, had permitted us to do so.

All that we ask now is that the order denying the motion for an injunction be reversed and an injunction *pendente lite* granted. We do not ask or expect a final decision that the enforcement of the orders of the Commission should be perpetually enjoined.

We do not think the appellees are entitled to a final decision that the orders of the Commission should not be enjoined.

And we respectfully insist that the question whether the orders of the Commission are to stand or fall can only be determined in the court below on the final hearing of the cause, after the parties have proven everything they can to defeat or sustain them.

The appellant certainly has a right to prove the truth of its bill of complaint, and if it does so the orders of the Commission can not be sustained. The appellant is entitled to its day in court, and a premature and interlocutory decision that the decree of the Supreme Court of Michigan is *res adjudicata* ought not to stand in the way.

We have but little respect for the statute permitting appeals of this kind to this court. It was enacted by Congress as a restriction on the power of the District Courts to grant preliminary injunctions; but it does not follow that all motions for injunctions *pendente lite* should be denied, or that a decision on such a motion should be decisive of the cause.

III.

In our first brief at page 30, we consider the question of depreciation and the allowances to be made therefor; and in answer to the question suggested by the Supreme Court of Michigan, whether the amounts charged off for depreciation in 1909 and 1910: "Should such sums have been so charged?" we said:

> "What right has any one to assume that this depreciation did not actually take place, when there is absolutely no evidence to the contrary?"

The learned counsel for the appellees, in reply, at page 6 of their brief, say:

> "What right has any one to assume that this depreciation did actually take place, when there is absolutely no evidence to that effect, and the complainant has the burden of proof?"

The tenacity with which the Supreme Court of Michigan and the learned counsel place their reliance on the burden of proof clauses of the statute is wonderful. Here is where we think they are hoist by their own petard.

The twenty-fifth section of the act (Record, p. 4) makes the orders of the Commission "*prima facie* lawful and reasonable until finally found otherwise in an action *brought pursuant to provisions of section twenty-six of this act.*"

And section 26, subdivision E (Record, p. 6), says:

> "*In all actions under this section* the burden of proof shall be upon the complainant," etc.

Now, the question whether the opinion and decree of the State courts is *res adjudicata* or not depends upon the *fact* whether the bill filed in the Wayne circuit by the railroad company invoked the special statutory jurisdiction of the State courts or their general equity jurisdiction.

If their special statutory jurisdiction was invoked, the clauses relative to the burden of proof do apply to the case so instituted.

But if their general equity jurisdiction was invoked, said clauses have no application, and all questions as to the burden of proof would depend on the general rules of evidence applicable to such questions.

Undoubtedly, under those rules, the presumption would be that the orders of the Commission were valid and reasonable, but that presumption could be met with another presumption, viz., that where a railroad company is re-

quired by law to file a report of its financial transactions each year the presumption on the face of the report would be that it was correct and true. The statements on such a report of the gross income of the company for the year, of its operating expenses, and taxes, and of the depreciation of its property, would be regarded as correct until overturned with proof.

The point we wish to make is that the reliance of the State Supreme Court and of the Attorney General of Michigan and his associate, on the special statutory provisions of sections 25 and 26, relative to the burden of proof, makes it perfectly plain and beyond question that the bill of the railroad company in the Wayne circuit and all the subsequent proceedings were not within or under the general equity jurisdiction of the State courts, but were simply special statutory proceedings in which the issue was whether the *prima facie* case of the Commission should stand and not what were the actual facts of the case.

The learned counsel for the appellees contend that the State Supreme Court did pass on the actual facts, but we have shown in our first brief at pages 26-32 that the court did not do so, in that it refused to consider and determine the per centum of profit the Detroit and Mackinac Railway Company is entitled to earn, which, considering the state of the record as to the value of the property, was one of the vital questions in the case, and, next to the question of jurisdiction, the most important.

We respectfully submit that the order of the three Federal judges should be reversed on the ground that, under the allegations of the bill, the decision of the State Supreme Court was not *res adjudicata*, and the case remanded to the court below, with directions to reserve its decision on the question of *res adjudicata* until the final hearing of the cause.

We also submit that, upon the case as it stood before the

three Federal judges, the railroad company was entitled to an injunction on filing the indemnity bond it offered to file in the eighth paragraph of its bill, and that this court should so declare.

JAMES McNAMARA,
FRED A. BAKER,
Counsel for Appellant.

Supreme Court of the United States

October Term, 1914.

No. 209.

DETROIT AND MACKINAC RAILWAY COMPANY,
Appellant,

vs.

MICHIGAN RAILROAD COMMISSION, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, FLETCHER PAPER COMPANY, AND FRANK R. GILCHRIST, WILLIAM A. GILCHRIST, GRACE GILCHRIST FLETCHER, AND RALPH E. GILCHRIST, EXECUTORS OF THE ESTATE OF FRANK W. GILCHRIST, DECEASED,
Appellees.

BRIEF FOR APPELLANT

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Appellant.

DETROIT:
Record Printing Co., Free Press Bldg., 11-17 Lafayette Boulevard.
1914.

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TABLE OF CITATIONS.

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

The Constitution of Michigan contains the following provision (Art. XII, Sec. 7):

> "The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this state, and may pass laws establishing reasonable maximum rates of charges for the transportation of property by express companies in this state, *and may delegate such power to fix reasonable maximum rates of charges for the transportation of freight by railroad companies and for the transportation of property by express companies to a commission*

created by law; and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad."

The act creating the Michigan Railroad Commission was revised by a new act passed in 1909. *Michigan Public Acts,* 1909, pp. 704-733; 3 *Howell's Mich. Stat., 2d Anno. Ed., Secs.* 6524-6575.

The act is modeled after the Interstate Commerce Act.

The provisions of the act to be considered in this case are as follows:

Sec. 22 (a). Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty days after such notice has been given the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make the investigation, the commission shall give the said common carrier and the complainants at least ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. Such hearings may be continued from time to time in the discretion of the commission. *If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future,* and such classifications, regulation, practice or

service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof. All common carriers to which the order applies shall, on or before the date when such order becomes effective, make such changes in schedules on file as shall be necessary to make the same conform to such order, and no change shall within two years thereafter be made by any such common carrier in any such rates, fares or charges, or in any such joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the common carriers thereby affected in like manner, and the same shall take effect within such times thereafter as the commission shall prescribe;

(b) The commission may, when the complaint is made of more than one rate or charge, order separate hearings thereon, and may consider and determine the several matters complained of separately and at such times as it may prescribe. No complaint shall of necessity at any time be dismissed because of the absence of direct damage to the complainant;

(c) Whenever the commission shall believe that any rate or rates or charge or charges may be unreasonable or unjustly discriminatory, or that any service is inadequate, and that any investigation relating thereto should be made, it may, upon its own motion, investigate the same. Before making such investigation, it shall present to the common carrier a statement in writing, setting forth the rate or charge to be investigated. *Thereafter, on ten days' notice to the common carrier of the time and place of such investigation, the commission may proceed to investigate such rate or charge in the same manner and make like orders in respect thereto as if such investigation had been made upon complaint;*

(d) This section shall be construed to permit any common carrier to make complaint of like effect as though made by any person, firm, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal organization;

(e) The commission may, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and the terms and conditions under which such through routes shall be operated when the common carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates: Provided, No reasonably satisfactory through route and joint rate exist. Whenever the common carrier or common carriers, in obedience to an order of the commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate, fare or charge to be received by each common carrier party thereto, which order shall take effect as part of the original order.

Sec. 23. * * * (d). A full and complete record shall be kept of all proceedings had before the commission on any investigation had under section twenty-two of this act and *all testimony shall be taken down by a stenographer appointed by the commission.* When any complaint is served upon the commission under the provisions of section twenty-six of this act the commission shall, before said action is reached for trial, cause the certified transcript of all proceedings had and testimony taken upon such investigation to be filed with the clerk of the Circuit Court of the county where the action is pending. *A transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, taken by the stenographer, certified by him to be a true and correct transcript of all the testimony on the* investigation or of a particular witness, or of any specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and transcribed shall be received in evidence with the same effect as if such stenographer were present and testified to the facts so certified. A copy of such transcript shall be furnished upon demand, free of cost, to any party to such investigations, and to all other persons on payment of a reasonable amount therefor.

Sec. 25. All rates, fares, charges, classifications and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission *shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant* to the provisions of section twenty-six of this act, or until

changed or modified by the commission as provided for in section twenty-four of this act.

Sec. 26 (a). Any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, *may within thirty days from* the issuance of such order and notice therof *commence an action in the Circuit Court in Chancery against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed are unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable;* in which suit the commission shall be served with a subpoena and a copy of the complaint. The commission shall file its answer, and on leave of court any interested party may file an answer to said complaint. Upon the filing of the answer of the commission said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the Circuit Court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and *the Circuit Courts in Chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law;*

(b) No injunction shall issue suspending or staying any order of the commission, except upon application to the Circuit Court in Chancery or to the judge thereof, notice to the commission having been given and hearing having been had thereon;

(c) If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further

proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action and shall report its action thereon to said court within ten days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed; *if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance.* If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order;

(d) Either party to said action, *within sixty days after service of a copy of the order or judgment of the court, may appeal to the Supreme Court, which appeal shall be governed by the statute governing chancery appeals.* When the appeal is taken the case shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or if no term is then pending, shall take precedence of cases of a different nature except criminal cases at the next term of the Supreme Court;

(e.) In all actions under this section the *burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be.*

On a chancery appeal the Supreme Court of Michigan hears the case *de novo*, and disposes of it precisely the same as if it had not been heard in the court below. 1 *C. L.* 1897, *Sec.* 553; 4 *Howell's Mich. Stat., Sec.* 12079.

Haines vs. Haines, 35 *Mich.*, 138, 143.
Kelly vs. Gaulker, 164 *Mich.*, 519, 531.

PROCEEDINGS.

October 22nd and November 3rd, 1909, the Michigan Railroad Commission granted orders reducing the rates charged by the Detroit and Mackinac Railway for transporting logs in carload lots to the City of Alpena. (*Record, pp.* 15-18).

A complete history of the case is set forth in the 5th paragraph of the bill of complaint. (*Record, p.* 2.)

November 22nd, 1909, the Detroit and Mackinac Railroad Company filed a bill in the Circuit Court for the County of Wayne in Chancery to vacate and set aside said orders on the ground that the rates and charges fixed by them are unlawful and unreasonable. (*Record, p.* 2.)

The suit so commenced was prosecuted in strict compliance with the statutory provisions to a decree in the Wayne Circuit, dismissing the bill. (*Record, p.* 2.)

An appeal was regularly taken to the Supreme Court of the state, where the decree below was affirmed. (*Record, p.* 2; 171 *Mich.*, 335.)

We endeavored to sue out a writ of error but Mr. Justice Day was of the opinion that the State Court had so far decided the facts against the railroad company, that there were no federal questions left that could be reviewed on a writ of error.

The Detroit and Mackinac Railway Company, then filed the bill in the present case, in which it attacks both the facts and law, as found by the Railroad Commission and affirmed by the State Courts. (*Record, pp.* 1-20.)

A motion for a preliminary injunction was heard before three federal judges under the recent statute; and they being of the opinion that the decision and decree of the Supreme Court of Michigan is *res adjudicata*, and conclusive and final, the motion was denied. (*Record, p.* 65.)

Their opinion is in the *Record, pp.* 56-64. The Railroad Company took and perfected an appeal to this Court. (*Record, pp.* 72-78.)

THE BILL OF COMPLAINT.

The bill of complaint properly invokes the jurisdiction of the court on constitutional grounds. (*Record, p.* 1.)

It states the fact that the Michigan Railroad Commission granted its orders of October 22nd and November 3rd, 1909, reducing the rates of complainant for the transportation of logs from the private logging tramways of Alpena lumbermen and others to the City of Alpena; and copies of the orders are annexed to the bill as Exhibits A and B. (*Record, pp.* 2, 15-18.)

It sets forth, as above stated, the history in detail of the proceedings in the case, and it then makes averments designed, not only to show what the controversy was about, but also to show in a general way what the facts of the case were:

The 6th paragraph of the bill reads:

> "6. That in the proceedings so had before the Michigan Railroad Commission, the Circuit Court for the County of Wayne, in Chancery, and the Supreme Court of Michigan, your orator contended and showed by clear, uncontradicted and conclusive evidence:
>
> (1) That the logging tramways connecting with the railroad of your orator are the private property of the several lumbermen who make use of them; that your orator does no public business as a common carrier on them and they are no part of its public railway, and therefore they are not subject to regulation or control by the Michigan Railroad Commission, or by any other governmental authority whatever; and that the said orders deprive your orator of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.
>
> (2) That the rates fixed by said orders for the hauling of logs from said logging tramways, are less than the actual cost of the service, and much less than the actual cost and a fair profit, and said rates are therefore unreasonable, and confiscatory, and deprive your orator of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.
>
> (3) That the rates fixed by said orders for the haul-

> ing of logs from said logging tramways to Alpena would seriously impair the general net income and profits of your orator, and reduce the same to less than it is entitled to earn upon the fair value of its property devoted to the public use; and said rates if enforced would deprive your orator of its property without due process of law, and deny to it the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States."

The seventh paragraph of the bill alleges that while the Michigan act is fair on its face it was construed and enforced with an evil eye and a strong hand, and as so construed is in conflict with the Fourteenth Amendment.

This has reference to the action of the Michigan Railroad Commission and of the Supreme Court of the State in disposing of the case without any charge or accusation and on ex parte, secret and undisclosed evidence, which was not made known to the railroad company and it was given no opportunity to rebut or explain.

See opinion of the Supreme Court of Michigan in this record at bottom of page 35, and 171 *Mich.*, at top of page 347, where it is said:

> "We notice, in this connection, that in returning the testimony to the Circuit Court the Commission states that its original conclusions are confirmed by a *personal examination of the locality in which the service of complainant is performed and by knowledge acquired independent of the testimony produced before it. Manifestly, this Court cannot share in knowledge so acquired unless evidence of the facts discovered, or supposed to have been discovered, is in some way brought upon the record.*"

The full meaning of the court is shown by the words used in *Detroit and Mackinac Railway Co. vs. Michigan Railroad Com.*, 144 N. W., where the court, at p. 392, said:

> "On the contrary, it affirmatively appears that in both courts it was recognized that in determining the reasonableness of charges and practices complained about, the *Commission may consider facts which the Courts may not consider.*"

The eighth paragraph of the bill shows why an injunction *pendente lite* should be issued.

The ninth to the twenty-first paragraphs of the bill, inclusive (*Record, pp.* 4-13), set up the actual facts of the case, which cannot be understood without reading those paragraphs, and we therefore refrain from making an abstract of them.

They show in great detail that the general statement of facts in the sixth paragraph is true.

Appropriate temporary and final relief is prayed. (*Record, pp.* 13-14.)

THE MOTION FOR INJUNCTION.

The motion for a preliminary injunction was based on the bill of complaint (*Record, p.* 21).

The Railroad Commission and the other defendants filed objections, affidavits and exhibits in opposition to the motion (*Record, pp.* 25, 54).

The exhibits consist of a copy of the opinion of the Supreme Court of Michigan and a certified copy of the order and decree of the court (*Record, pp.* 27-51).

Also copies of the printed record and of the briefs of counsel, verified by the affidavit of Mr. Hezekiah M. Gillett, one of the counsel for the defendants (*Record, p.* 26).

The affidavit of Frank W. Fletcher was filed in an effort to show that Justice Day said the decree of the State Court was conclusive and final (*Record, p.* 52).

DESIGNATION OF RECORD.

The appellee filed a designation of the portions of the record to be incorporated into the transcript on its appeal, omitting the voluminous printed record and briefs of counsel in the case in the Supreme Court of Michigan (*Record, pp.* 79, 80).

Counsel for appellees, other than the Michigan Railroad Commission, filed a designation, in which they requested that there should be included in the transcript:

> "A summary of the contents of the record and briefs in the Supreme Court of Michigan mentioned and made a part of the affidavit of Hezekiah M. Gillett, filed by these defendants in opposition to said motion for injunction.
>
> "Copy of such summary is annexed hereto and made a part of this praecipe.
>
> "In case the solicitors for the appellant do not consent to the inclusion of such summary in the transcript, these defendants demand that such parts of said printed record and briefs be incorporated into the said transcript as may be necessary to evidence the facts recited in such summary." (*Record*, *p.* 31.)

Counsel for appellant and the Attorney-General of Michigan as counsel for the Michigan Railroad Commission then signed a stipulation that the summary might be included in the transcript, the counsel for the appellant annexing the following foot note:

> "The solicitor for the complainant and appellant signs this stipulation because he does not regard the record and briefs in the Supreme Court of the State as a legitimate part of the record in this case, which must be disposed of on the allegations of the bill herein, and the case cannot be tried or heard on issues of fact which have not been framed in the case and cannot be until an answer is filed in the case" (*Record*, *p.* 89).

DEMURRERS AND MOTIONS TO DISMISS.

The defendants first filed demurrers (*Record*, *pp.* 22, 23).

As demurrers have been abolished, they afterwards filed motions to dismiss (*Record*, *pp.* 68, 70).

Neither the demurrers or the motions to dismiss have been heard by or submitted to the court, not being within the jurisdiction of the three federal judges, and the District Court for the Eastern District of Michigan, refusing to hear them until this appeal is determined by the Supreme Court of the United States.

The assignment or errors is on page 74.

The main question in the case is whether the decision and decree of the Supreme Court of Michigan is *res adjudicata*.

Our assignment of errors present the different aspects of that question; and as all the errors assigned are relied on, we here insert them in full.

ERRORS RELIED ON.

1. The court, consisting of the three judges who heard and determined the motion for an injunction, erred in refusing to grant the injunction prayed, and in denying said motion.

2. The court erred in taking jurisdiction of the question whether the powers conferred upon the state courts by the act creating the Michigan Railroad Commission, (No. 300 Public Acts of Mich., 1909, pp. 704-733), to review the orders of the commission are under the constitution of Michigan, judicial and not legislative.

3. The court erred in refusing to hold that the powers conferred upon the state courts by said Act, are legislative powers and not judicial.

4. The court erred in refusing to hold that the Federal courts should determine for themselves whether any given action of a state government is legislative or not by considering the nature of the power exercised and should not allow that question to depend upon which one of the three departments of the state government took the action called in question in any case.

5. The court erred in refusing to hold that there is nothing in the constitution of the United States, which prevents a state from commingling the powers of government, either by constitutional provision, by legislative enactment, or by judicial decision.

6. The court erred in refusing to follow the decision and instruction contained in the opinion of the court by Mr. Justice Holmes in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, and in practically overruling that case, by untenable efforts to distinguish it from the present case.

7. The court erred in holding that the said decision of the state Supreme Court, affirming the decree of

the Wayne Circuit Court in Chancery, is *res adjudicata*, and conclusive and final.

8. The court erred in holding that the complainant voluntarily invoked the judicial power of the state courts, when it is apparent on the face of the record, that the complainant filed his (it's) bill in the Circuit Court of the County of Wayne, in Chancery, in obedience to the requirements imposed upon it by the Supreme Court of the United States in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210.

9. The court erred in ignoring the fact that the said act of the State Legislature confers the same powers on the state courts as those exercised by the Michigan Railroad Commission, and that the Supreme Court of the state has already held that the powers conferred on the commission are not judicial powers. *Michigan Central Railroad Co. vs. Michigan Railroad Commission*, 160 *Mich.*, 355.

10. The court erred in holding that the constitution of Virginia is so essentially different from the constitution of Michigan that the decision of the Supreme Court of the United States in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, is not a binding authority in the present case.

11. The court erred in overlooking the fact that the constitution of Michigan is identical with the constitution of Virginia, the only difference being that the constitution of Virginia creates a state corporation commission, and the constitution of Michigan provides that such a commission may be created by law, and that the power conferred on the state court or courts to review the orders of the commission and to make such orders as the commission ought to have made is the same in both states.

12. The court erred in assuming that if the state conferred upon its judicial department the entire rate making power, from start to finish, the findings of fact of that department would be conclusive and final, and beyond review by the Federal judiciary; and that thereby the due process of law clause of the Fourteenth Amendment of the Constitution of the United States would be suspended, as far as the facts of any case were concerned.

I.

The first question to be considered in this case is whether there is any material difference between the Virginia State Corporation Commission law and the Michigan Railroad Commission law.

There are some slight differences but they are not important or material.

The whole of the Virginia law is in the constitution of the state adopted in 1902. Art. XII.

The Michigan law is partly in the State Constitution and partly in an Act of the State Legislature.

We have already set forth in this brief the provisions of the Michigan law and we will now set forth the provisions of the Virginia law.

Constitution of Virginia, 1902.

Art. 12, Sec. 156:

(b) * * * Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, *and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon*, to the end that justice may be done and shall have process to enforce the attendance of witnesses;

(d) From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a

suspending bond, or requiring additional security thereon or an increase thereof, as provided for in sub-section e of this section, *an appeal* (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law), *may be taken by the corporation whose rates*, charges or classifications of traffic, schedule, feilities, conveniences or service, are affected, or *by any person deeming himself aggrieved by such action*, or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for appeals from any other action of the commission, by the Commonwealth or by any person interested, irrespective of the amount involved. *All appeals from the commission shall be to the Supreme Court of Appeals only;* and in all appeals to which the Commonwealth is a party, it shall be represented by the Attorney-General or his legally appointed representative. No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court of Appeals to the commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

(f) In no case of appeal from the commission shall any new or additional evidence be introduced in the Appellate Court; but the chairman of the commission, under the seal of the commission, shall certify to the Appellate Court all facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and

requested to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the appelate court, upon disposing of the appeal. *The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter arising under such appeal;* provided, however, that the action of the commission appealed from shall be regarded as prima facie just, reasonable and correct; but the court may, when it deems necessary, in the interest of justice, remand to the commission any case pending on appeal, and require the same to be further investigated by the commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

(g) Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, *it shall, at the same time subsitute therefor such order as, in its opinion, the commission should have made* at the time of entering the order appealed from; otherwise, the reversal order shall not be valid.

Comparing the Michigan law with the Virginia law, it is plain that they are in substance and legal effect the same. They differ in matters of form and detail, but in no particular is the difference significant or of any importance.

1. It is of no consequence that the whole Virginia law is in the State Constitution and the Michigan law is partly in the constitution of the state and partly in an act of the legislature. In either form the several sections and provisions show what the law of the state is.

2. It is not material that the Virginia law provides for a direct appeal from the Corporation Commission to the Supreme Court of Appeals, and the Michigan law provides that the review of the orders of the Commission shall be first by a bill filed in a subordinate court and then by appeal to the Supreme Court of the State.

To say there is a substantial difference is a mere play upon words.

3. It is of no importance that the Michigan law requires the subordinate court, if any evidence introduced by the complainant before it is different from that offered upon the hearing before the Commission or is additional thereto, to transmit the same to the Commission for further consideration of its order, and a report thereon to the court, and the Virginia law provides that the Supreme Court of Appeals may, when it deems necessary in the interest of justice, remand the case to the Commission for further investigation and a report to the court.

The Michigan law requires the subordinate court to receive different or additional evidence, and the Virginia law permits it to be done, when the court deems it necessary.

4. Nor is it of any consequence that the Michigan law provides that Circuit Courts in Chancery and the Supreme Court on appeal shall have jurisdiction "to affirm, vacate or set aside the order of the Commission in whole or in part and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law," and the Virginia law provides that the "appellate court shall have jurisdiction to consider and determine the reasonableness and the justness of the action of the Commission appealed from," and "whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges or classification of traffic of any transportation or transmission company it shall at the same time substitute therefor, such order as in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid."

The Virginia law is the more positive but the legal meaning of both is the same, namely, that the court is to act in the same capacity as the Commission to the extent of making such order as the Commission on the facts and the law should have made.

II.

Without regard for any weight to be given to the case of *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, there are cogent and convincing reasons why the decision of the Supreme Court of Michigan, on the appeal to it, in this case, should not be held to be *res adjudicata*.

1. The Detroit and Mackinac Railway Company did not invoke the general equity jurisdiction of the Circuit Court for the County of Wayne, that is to say, it did not invoke the judicial power of the State Courts. What it did do, was to invoke the power and authority of the courts in virtue of the special statutory proceedings authorized by the Act.

The record shows that it filed its bill in the Wayne Circuit "within thirty days from the issuance of such order and notice thereof," that the case proceeded in the Wayne Circuit and in the Supreme Court as a case under the special statute.

The evidence introduced in the Wayne Circuit was transmitted to the Commission and its report thereon received, and the Supreme Court based its decision on that report and the provision of the special act, that the rates fixed by the Commission

> "shall be prima facie, lawful and reasonable until finally found otherwise, in an action brought for the purpose *pursuant to the provisions of section twenty-six of this Act.*"

We quote the following from the opinion of the Supreme Court of Michigan as found in this Record, at pp. 35-6, and as reported, 171 *Michigan*, 346-7:

> "The duty of the courts in the premises is not essentially different from that of the commission. No different conclusion was stated in *Michigan Central R. Co. vs. Wayne Circuit Judge*, 156 *Mich.*, 459 (120 N. W., 1073, 16 Am. & Eng. Ann. Cas., 832). It is only after determining that the rate fixed by the Commission is unreasonable that the court may set it aside. Presumptively, the findings and orders of the Commission are right. If attacked, the complainant has the burden of showing 'by clear and satisfactory evidence that the

order of the Commission complained of is unlawful or unreasonable, as the case may be.'

"The difficulty and perplexity of such an inquiry would deter anyone, to whom the task was not a duty, from pursuing it, in the first instance, and from reviewing a determination once made. It is unfortunate that the courts do not have the assistance which would be derived from a finding made by the commission which would distinctly state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable. We notice, in this connection, that in returning the testimony to the Circuit Court the Commission states that its original conclusions are confirmed by a *personal examination of the locality in which the service of complainant is performed and by knowledge acquired independent of the testimony produced before it. Manifestly, this Court cannot share in knowledge so acquired unless evidence of the facts discovered, or supposed to have been discovered, is in some way brought upon the record.*"

In the case cited of *Michigan Central R. Company vs. Circuit Judge*, 156 *Mich.*, 459, the Court, at page 470, said:

"We do not construe the provisions of this Act to lodge in the courts the power to establish rates. The power conferred upon the courts is solely to determine whether the rates are confiscatory or unreasonable. If the courts should so find, they are not authorized to determine what are reasonable, but the matter must be again referred to the Commission to establish other rates. If they are found to be reasonable, the courts will sustain the action of the Commission. If, however, it should be determined that such power was conferred upon the courts and is unconstitutional, the act would still be held valid, because it could stand with that clause eliminated from the statute."

This was quoted and reiterated in the case cited by the learned counsel for the appellees in their brief in support of their motion to dismiss, etc., of *Detroit & Mackinac Railway Company vs. Mich. R. Commission*, 144 *N. W.*, 689, 691, *near bottom of first column.*

All of which means that the Supreme Court of Michigan accepts and adopts the ruling of the Supreme Court of the United States in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*,

210, and *Louis. & Nash. R. Co. vs. Garrett*, 231 *U. S.*, 298, that fixing rates for the future is a legislative and not a judicial function.

2. The Detroit & Mackinac Railroad Company did not invoke the power conferred on the State courts by the special act to fix rates for the future by making

> "such other order or decree as the courts shall decide to be in accordance with the facts and the law."

The bill filed by the company in the Wayne Circuit was

> "to vacate and set aside said orders of the commission of October 22, 1909, and November 3, 1909, on the ground that the rates and charges fixed by said orders are unlawful and unreasonable." (*Record, p.* 2.)

The bill did not pray that in case the orders of the Commission were vacated and set aside that the court should fix such rates as it found to be in accordance with the facts and the law. Nor did the Railroad Commission in its answer pray for any such relief. All it asked was that

> "its orders in the premises may be affirmed and the bill of complaint filed herein dismissed."

The Commission did not pray for any affirmative relief; not even for an order directing the railroad company to put the rates of the Commission into effect (*Detroit & Mackinac Railway Company vs. Michigan Railroad Commission et al.*, 144 *N. W.*, 689.

Counsel for appellees cite that case in support of the motion to dismiss, etc., and we assume we have a right to make this use of it.

It is obvious that the question whether the State courts have power to fix rates for the future cannot arise in any case, unless they vacate and set aside the rates fixed by the Commission.

All they did do in this case was to affirm the orders of the Commission and dismiss the bill of complaint. The special statutory power of the courts to fix rates was not invoked and was not exercised; in fact, it was held non-existent.

The decision of the Supreme Court of Michigan, that the State courts have no power to fix rates, must be regarded as a correct construction of the constitution and laws of the

State, and as it is in accord with the definitions of the Supreme Court of the United States of the legislative and judicial powers, the correctness of the decision cannot be questioned by anyone.

But it does not follow that when the State courts refuse to disturb the rates fixed by the Commission, and affirm its order, on an appeal to them under and in strict compliance with the special statutory provisions of the Railroad Commission Act, that the decision and decree of the Court are to be regarded as a final and conclusive adjudication of the facts on which the Commission acted.

The purely legislative action of the Railroad Commission is allowed to stand as far as the special statutory proceeding is concerned, and the facts on which the action of the Commission is based are not affirmed or adjudicated.

This is shown by the quotation we have made above from the opinion of the Supreme Court of Michigan, in this record, at pp. 35-6, and reported 171 *Mich.*, 346-7, and the opinion of the Court, 144 *N. W.*, 692. (See p. 9 of this Brief).

How can a decision and decree be considered *res adjudicata* and final of facts not made known to the Court and not considered by it?

3. The proceedings before the Michigan Railroad Commission were legislative proceedings; they were only *quasi* judicial, and the issue to be determined in the resort to the State Courts was not the same as that presented and tendered by the bill of the railroad company in the District Court of the United States for the Eastern District of Michigan.

The bill in the Federal Court raises the question: *What are the actual facts of the case?* No such question was before the State courts. There the issue was whether the railroad company with the burden of proof resting upon it had shown "by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable." And that question was disposed of by the Court by assuming that the testimony introduced by the railroad company to sustain the issue on its part was met, overcome and counterbalanced by *ex parte*, secret and undisclosed evidence, which was not introduced before the Commission, was not made known to the railroad company to enable it to rebut and refute the same,

and was not brought into the record or otherwise made known to the Court.

It may have been, and probably was, the fact that no evidence whatever was introduced before the Commission tending to show that the rates the Detroit & Mackinac Railway Company was charging for the transportation of logs to Alpena were unreasonable and that the action of the Commission and of the courts was wholly based on *ex parte*, secret and undisclosed evidence in violation of due process of law clause of the Fourteenth Amendment of the Constitution of the United States as expounded by this Court in *Int. Com. Comm. vs. Louis., Nash. R. Co.*, 227, *U. S.*, 91, 93, and in other cases.

III.

The importance of this case arises from the fact that under the instruction of the Supreme Court of the United States in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210, counsel in this and in other like cases in Michigan and other States as they arise are compelled before filing a bill in the Federal Court to first resort to any special statutory proceedings provided by the constitution or laws of the State for the review on the facts of the action of a railroad or corporation commission fixing rates.

In the Prentiss case the decree below in favor of the plaintiffs was reversed, but as there was a question whether it was not too late to take an appeal from the corporation commission to the Supreme Court of Appeals; and, therefore, the opinion of the Court by Mr. Justice Holmes concludes as follows:

> "If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the Commission affirmed, the bills may be dismissed without prejudice and filed again" (211 *U. S.*, 232).

This ruling of the Court was accompanied with the following, found on p. 230:

> "If the rate should be affirmed by the Supreme Court of Appeals and the railroads still should regard it as

confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of *res adjudicata*. It will not be necessary to wait for a prosecution by the Commission. We may add that when the rate is fixed a bill against the Commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a State, and will be the proper form of remedy."

There is a still more serious difficulty. At another place in the opinion it is said that a State cannot be said to have fixed a rate until the last body having a say in the matter has acted, so that if the decision of that body under a special statutory proceeding for a review is *res adjudicata* of the facts, the Constitution of the United States and the jurisdiction of the Federal Courts are both suspended and held for naught under the rule that on a writ of error to a State court, the facts cannot be inquired into.

Justice Holmes, referring to that matter for the Court said:

> "If the railroads were required to take no active steps until they could bring a writ of error from this Court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. *But the determination as to their rights turns almost wholly upon the facts to be found.* Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, *depend upon what the facts are found to be.* They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent."

The decrees of the State courts in the present case affirming the orders of the Railroad Commission did nothing more than to leave the legislative action of the Commission in full force and effect. The State courts simply refused to disturb that action or the facts or alleged facts on which it was based.

The Detroit & Mackinac Railroad Company, in its bill in

the Federal Court, does not attack the action of the State courts; it does attack the legislative action of the Railroad Commission, on the facts; and as to those facts it has a right to be heard; for, if it has no such right it is denied the protection secured to it by the Constitution of the United States.

IV.

A prior judgment between the same parties on the merits of the same cause of action is conclusive and final, but it must appear that the same issues were involved and were determined.

In the present case the issues were not the same. The statutory provision that

> "In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be,"

is a two-edged sword; it cuts both ways; it puts the burden on the complainant; and it also changes the issue.

The act of Congress of February 22nd, 1875, 18 *Stat.*, 333, *Rev. Stat.*, *Sec.* 846, provides that the accounts of Commissioners of the United States Circuit Courts and of certain other officers of those courts

> "shall be examined and certified by the District Judge of the district for which they are appointed before they are presented to the accounting officers of the Treasury Department for settlement."

In *United States vs. Jones*, 134 *U. S.*, 483, the Court said:

> "The approval of the Commissioners' account by the Circuit Court of the United States under the Act of February 22, 1875 (18 Stat., 333), is prima facie evidence of the correctness of the items of that account, and in the absence of clear and unequivocal proof of mistake on the part of the Court should be conclusive."

Dennison vs. United States, 168 *U. S.*, 241, was an appeal from the Court of Claims, and concerned an account of a Chief Supervisor of Elections for the Northern District of

New York. The Court of Claims had disallowed certain items and the claimant relied upon a prior adjudication of the Court of Claims, allowing various items of service of the same nature and description as those disallowed in the instant case. *Jones vs. United States*, 25 *C. Cl.*, 304.

The Court held that the prior adjudication was not *res judicata*. Referring to the opinion of the Court of Claims, Justice Brown, for the Court, said that it appeared that the items of the account were not passed upon in detail and the judgment in favor of the claimant was upon the ground that the approval of the account by the District Court threw upon the government the burden of disproving the correctness of the several items.

In other words, the judgment of the Court of Claims was based on the prima facie case of the claimant, and not upon the actual facts and merits of his case.

The Court further held that the suit under consideration was not for the same items as those allowed in the former case, but for similar items, and the case was within *Cromwell vs. Sac County*, 94 *U. S.*, 351, and concluding his opinion, Justice Brown said:

> "There was no issue raised and decided in the former case as to the legality of the several items considered separately, but such issue is clearly raised in this case."

We submit that the decision of the Supreme Court of Michigan refusing to disturb the orders of the Michigan Railroad Commission of October 22 and November 3, 1909, was a decision on an issue which did not involve the actual facts of the case, but only concerned the question and issue whether the prima facie case of the Commission had been overthrown by clear and satisfactory evidence.

For the purpose of determining whether a former judgment is conclusive or not it is competent to examine the entire record to see what was and what was not adjudicated. *Washington Gas Co. vs. Dist. of Columbia*, 161 *U. S.*, 316, 329.

In Michigan the opinion of the State Supreme Court is a part of the record. 1 *How. Mich. States, Sec.* 11710, *Consti., Art. VII., Sec.* 7.

V.

The opinion of the Supreme Court of Michigan shows that the Court held that it had no jurisdiction to decide and that it did not decide the main questions of fact involved in the proceedings before the Michigan Railroad Commission.

1. The most important and decisive question was: What percentage of profit the Detroit and Mackinac Railroad Company is entitled to earn on the fair value of its railroad property, located where it is, and considering the nature of its business, opportunities and prospects?

The Supreme Court of Michigan disposed of that question (*Record, p.* 20) as follows:

> "Assuming that complainant is entitled to maintain tariffs which will yield a net return of six per cent per annum, or more, upon the value of the property it devotes to the public use and convenience, has it fairly shown that it does not now get such a return? We are not disposed to enter upon a consideration of the question whether complainant is entitled to a net return of 5 or 6 or 7 per cent upon its property; we are disposed to make it clear, with what may seem needless prolixity, that the margin between what complainant claims and what it admittedly received is a small one, increasing and diminishing, as we indulge or do not indulge assumptions, and that the enforcement of an order reasonable in itself will not be forbidden except upon clear proof that the result is and must be to deprive complainant of a fair return upon the value of its property."

Ever since the case of *Stanislaus County vs. San Joaquin and King's River Canal and Irrigation Company*, 192 *U. S.*, 201, it has been assumed by many lawyers and judges that six per cent is a general limit adopted by this Court to be observed throughout the United States, although the Court has repeatedly said that each case depends on its own facts and circumstances.

The Supreme Court of Michigan, when it referred to six per cent as a basis for calculation, thought it was making a con-

cession to the railroad company, whereas the truth is that on the actual facts the railroad company is entitled to earn ten per cent.

In the New York gas case six per cent was allowed; in the Minnesota rate cases seven per cent was allowed, and in the Arkansas rate cases seven and a half per cent was allowed. That part of the decisions of the United States Circuit Courts in the railroad rate cases has not been criticized or overruled by the Supreme Court for the United States.

In the case of the bridge across the St. Lawrence which was liable to be swept away as the Tay bridge was, the Canadian court held that the bridge company was entitled to build up a sinking fund, and refused to reduce rates which produced 15 per cent. The Privy Council affirmed that decision.

The actual facts in the present case are set up in the 30th paragraph of the bill. (*Record, p.* 12.)

Seven per cent is necessary to put the investment represented by the fair value of the property on an equality with an ordinary real estate loan in Alpena or Presque Isle County. And at least one per cent should be added for greater risks, and two per cent should be added for a surplus or sinking fund.

Wilcox vs. Consolidated Gas Co., 212 U. S., 19, 48, 49.
Penn. R. R. vs. Phila. County, 220 Pa. St., 260.
Brymer vs. Butler Water Co., 179 Pa. St., 230.
Sheppard vs. North Pac. R. Co., 184 Fed., 765.
St. Louis Southern Ry. vs. Allen, 187 Fed., 291.
International Bridge Co. vs. Canada South., 8 Ont. App. 226.
Same Case, 8 Appeal Cases, 723.
East. Advance Rate Cases 20 Inter. Com. Com., 243, 271, 278.
West. Advance Rate Cases, Id. 307, 336.
Minneapolis & St. L. Ry. Case 230, U. S., 409, 472.

The importance of the per centum of profit the railroad company is entitled to earn arises from the bearing it has on the question whether the net income of the railroad company will be unconstitutionally impaired by the order of the Railroad Commission reducing the rates for the transportation of logs to the city of Alpena.

The net income the company is entitled to earn depends on the per centum of profit applied to the value of the property.

2. The opinion of the Supreme Court of Michigan states (*Record, pp.* 43-44) that the bill of complaint alleges, under a videlicit, that the value of the property is $4,585,000; that the stock and bonded indebtedness of the company, less $800,000 of bonds in the treasury, is $5,250,000; that the General Manager of the Company testified that the physical property could be reproduced for a sum greater than $5,000,000 and less than $6,000,000, and that the road is worth as situated $8,000,000; that the Circuit Judge assumed the value of the road to be $5,000,000, and that the state assessors had valued it for the purposes of taxation at $4,485,000. (Here the learned justice who wrote the opinion made a slip of the pen, as the $4,585,000 alleged in the bill is the valuation of the State Board of Assessors, and the Railroad Commission in its answer to the bill admitted the truth of that allegation).

The opinion continues (*Record, p.* 45):

> "We have stated the testimony upon the subject. We are of the opinion that with the burden resting upon complainant it should have presented other evidence from which the Court could determine, with reasonable certainty, the value of property. If the value of the property is to rest upon opinion, the opinion of the Commission is quite as valuable as that of the Court. The evidence before us entitled to the greatest weight is that of the assessed value of the property and the averments in the sworn bill of complaint. Evidence of a greater value, if it exists, is available to complainant."

We did introduce evidence of a greater value in the testimony of Mr. J. D. Hawks, the General Manager, who is a civil engineer of large experience in railroad construction, and intimately familiar with the entire property, most of which he had himself constructed. In view of the valuation of the state assessors, which we had adopted in framing the bill, and the express admission of the answer, we did not think anything more was necessary.

Seven per cent on $4,485,000 is $313,950, or more than the net profits of the road ever were. They were always less than $300,000, except in 1904, when they were $307,777.37, and 1908, when they were $306,757.04. In 1907 they were as low as $219,920.61, and in 1906, $203,152.70. The average for the six years, 1904 to 1909 inclusive, was only $267,991.19 (*Record, p.* 6).

The Court in its opinion (*Record, p.* 49) took the figures $4,585,000 in estimating the probable loss of the railroad company, as follows:

> "It seems probable that if the Commission's orders had been in effect during 1909, the resulting loss of revenue would have been from $21,000 to $25,000. The net earnings of the road for 1909 were $283,459.34, and for 1910 were $296,586.45, according to the annual reports made by the complainant. A loss of revenue of $25,000 each year would have reduced net earnings to $258,459.34 in 1909, and to $270,586.45 in 1910. Valuing the property invested at $4,585,000, a 6 per cent return thereon would be $275,100.
>
> "Ought we to assume that the net earnings of the road for the purposes of this case are those reported and above set out? It appears that a sum equal to nearly one-half of the net earnings reported was in each of the years, 1909 and 1910, charged off for depreciation. Should such sums have been so charged?"

The loss of $25,000 a year is the loss of a considerable sum of money, especially when it is extended over a number of years, as contemplated by the orders of the Michigan Railroad Commission; but it would not be serious and present any constitutional difficulties if it were not for the fact that the net earnings of the railroad company are, and always have been, inadequate. The case of the Detroit & Mackinac Railway Company is identical with that of the *Minneapolis & St. Louis Railroad Company*, in the *Minnesota Rate Cases*, 230 *U. S.*, 469-472.

Seven per cent on $4,585,000 is $320,950; eight per cent is $366,800, and ten per cent is $458,500. Either of these sums is a much greater net annual profit than the Detroit & Mackinac Railway Company has ever earned, or is likely to earn for any considerable period of years.

In this connection it must be remembered that the timber tributary to the Detroit & Mackinac Railway has already been largely exhausted, and in a few years will have entirely disappeared and all revenue from the transportation of logs will be cut off.

To say that six per cent, or even seven per cent, is adequate is to deny the cold facts of the case.

Operating expenses consist in part of depreciation, and it is the duty of a railroad company in making up its financial statement at the close of a fiscal year to make some allowance for depreciation.

The accounting rules of the Interstate Commerce Commission expressly require railroad companies to keep a depreciation account (in classification of operating expenses) on steam locomotives, electric locomotives, passenger train cars, freight train cars, electric equipment cars, floating equipment, and work equipment. *Pierce's Digest of Decisions under Act to Regulate Commerce*, 1887 *to* 1908, *pp.* 890-893.

The annual reports of the Detroit & Mackinac Railway for the years ending June 30th, 1909, and June 30th, 1910, contain the following items for depreciation:

	1909	1910
Rail	$ 75,000.00	$ 73,093.43
Steam Locomotives	13,282.20	12,706.64
Passenger Train Cars	12,420.36	11,675.16
Freight Train Cars	36,737.76	34,529.72
Work Equipment	710.64	668.04
Total	$138,150.96	$132,672.99

What right has anyone to assume that this depreciation did not actually take place, when there is absolutely no evidence to the contrary?

One of the largest, if not the largest, item of expense in the operation of a railroad is the depreciation in the rail and equipment inevitable from the constant wear and tear, injury and destruction occasioned by the operation of the road.

III. We have shown the disposition the Supreme Court of Michigan made of the two most important and vital questions in the case; and we think we have demonstrated that the Court did not determine (1) what the actual value of the property was in 1909, and (2) the per centum of profit the railroad company is entitled under the constitution to earn on the value of its property.

For the purpose of making a delusive computation of the net earnings of the company, the Court accepted the valuation of $4,585,000, and assuming that six per centum was

the limit, the Court held that the company was only entitled to earn $275,100. As the company did make a profit of $283,459.34 in the year ending June 30th, 1909, and of $296,586.45 in the year ending June 30th, 1910, the loss of $25,000 a year would make the reduction below the constitutional limit; for the year 1909, $16,640.66, and for the year 1910, $4,513.55.

The Court does not seem to have realized that even these reductions would be a violation of the constitutional rights of the railroad company, and just as much forbidden as if the loss each year was a much greater sum of money.

But if the company was entitled, under the constitution, to earn seven per cent, its loss would be greater by $45,850; and if the company was entitled to earn eight per cent, its loss would be greater by $91,700; and if the company was entitled to earn ten per cent, its loss would be greater by $183,400 a year.

This shows that the Court was guilty of two serious errors (1) in refusing to consider the question: What per centum of profit on the value of its property is the Detroit & Mackinac Railway Company entitled to earn? and (2) in assuming without any such inquiry and determination that the constitutional limit is six per cent.

The Supreme Court of Michigan did absolutely refuse to consider the question, and to shield itself sought refuge in the burden of proof clause of the statute and its own incompetency to do anything more than to determine the question whether the prima facie case of the Railroad Commission was overcome by clear and satisfactory evidence.

And in reaching a negative conclusion on that question, it relied, as we heretofore pointed out in this brief, on the *ex parte*, secret and undisclosed evidence on which the Railroad Commission made its final report, and on evidence the Commission could consider but the Court could not.

The Supreme Court of Michigan had before it all the known criteria for determining the per centum the Detroit & Mackinac Railway Company is entitled to earn, and if the Court had treated that question as an open one, as it was bound to do, and given it careful consideration, it would have held, that looking at the Detroit & Mackinac Railway, as it is, location, termini, business, opportunities and prospects, it is

entitled to earn at least eight per centum, and that the reduction of net profits, already inadequate, the orders of the Railroad Commission would cause, would be so great as to make all minor considerations unimportant.

It is not too much to say that the decision and judgment of the Supreme Court of Michigan is not *res adjudicata* of the case made by the bill of complaint in this cause, because that Court, on its own showing, had no jurisdiction to determine, and it did not determine the actual facts of the case.

VI.

The decision and decree of the Supreme Court of Michigan is void because neither the Michigan Railroad Commission or the Court had jurisdiction.

The logging tramways connected with the railroad of the Detroit & Mackinac Railway Company are mere private conveniences resting in contracts between the railroad company and the lumbermen by whom they are owned and controlled.

The facts are alleged in the 13th, 14th, 15th and 19th paragraphs of the bill of complaint herein. (*Record, pp.* 8, 9, 10, 11).

Not being charged with a public interest, these private tramways are not within the jurisdiction of the Michigan Railroad Commission.

This is a question that is not influenced by the statutory provision relating to the burden of proof. The burden of proof to make out a public interest or use is on the Commission. *Oregon R. & N. Co. vs. Fairchild*, 224 *U. S.*, 510, 530.

In the present case the Michigan Railroad Commission exercised jurisdiction, and the Supreme Court held that the Commission had jurisdiction over these logging tramways. (*Record, pp.* 32, 33).

But that does not prevent the railroad company from showing what the facts are on which the jurisdiction depends.

Thompson vs. Whitman, 18 Wall., 457.
National Exchange Bank vs. Wiley, 195 U. S., 257, 269.

This is a question on which the allegations of the bill herein must be taken as true. The averments of the bill can only be overcome by an answer and proofs.

If the railroad company proves the averments of the bill to be true, the Railroad Commission had no jurisdiction, and its orders of October 22 and November 3, 1909, are void, and the decree of the Supreme Court of Michigan affirming the orders is also void. Neither the Commission or the Court had any power or authority to compel the railroad company to reduce its rates for service on the logging tramways.

Sabre vs. Rutland R. R. Co., 86 *Vt.*, 347, is a case where it was held that an order of the Vermont Public Service Commission, though made on proper petition, and after due notice and hearing thereon, will be set aside on appeal, when it appears that after the hearing the Commission employed an expert who made investigation and reported the result thereof to the Commission, who considered the report in arriving at their conclusion, and no opportunity was given the appellant either to examine the expert, to present evidence in rebuttal, or to argue the case as it finally stood.

It is further alleged in the bill that no complaint was ever made to the Michigan Railroad Commission by the Alpena Lumbermen that the rates of the company were unreasonable or in any way excessive. See last clause of paragraph 15 of the bill (*Record, p.* 10).

This is a direct attack upon the jurisdiction, for without a charge, or accusation by aggrieved parties, or formulation by the Commission itself, there could be no valid order or decree. *Standard Oil Co. vs. Missouri*, 224 *U. S.*, 290, 281.

The three federal judges who denied the motion for an injunction wholly misapprehended the nature, purpose and force of the averments of the bill, and disposed of the question of *res adjudicata*, without any consideration of the question of jurisdiction.

The Michigan Statute contains provisions under which a single industry can obtain a spur not more than two miles long by paying the entire expense thereof, and which would be a part of the trackage of the railroad and subject to governmental control, under the case from Wisconsin of *Union Lime Co. vs. Chicago & N. W. Ry. Co.*, 233 *U. S.*, 211.

The Michigan Act, 3 *How. Mich Stat., 2d Ed., Sec.* 6529, differs from the Wisconsin Act in this, that the latter limits the length of the spur to three miles and the former says two miles; and in this, that the Michigan Act does not contain, as the Wisconsin Act does, provisions requiring other parties desiring a connection with such spur to pay to the party at whose expense the spur was constructed an equitable proportion of such expense to be determined by the Railroad Commission.

It is only where the spurs, tramways or sidings, built under private contracts, are within the terminal or station, switching limits of the railroad company, that the private contracts are invalidated by the orders of a commission. *Interstate Com. Com. vs. Atchinson, etc., R. Co.*, 234 *U. S.*, 294.

It is obvious that the logging tramways in question in this case, all of which are more than two miles long, and none of which were built as permanent sidings, are not within the established switching limits of the Detroit & Mackinac Railway Company.

VII.

There are special reasons in this case why the decision of the State Supreme Court should not be held *res adjudicata*.

The bill of complaint in the Wayne Circuit Court was filed the 29th day of November, 1909, just within a year after the decision of this Court in *Prentiss vs. Atlantic Coast Line*, 211 *U. S.*, 210.

Counsel could not very well refuse to follow that decision. The Virginia law and the Michigan law are so nearly identical that it would have been foolhardy to abandon the right to file a bill in the State court by filing a bill in the Federal court.

The Vermont statute recently considered by this Court, in *Bacon vs. Rutland R. Co.*, 232 *U. S.*, 134, did not purport to confer on the State Supreme Court any power to fix rates for the future or any legislative power, and hence the right to appeal to that Court was no bar to a bill in the Federal court.

That case does not decide that if an appeal to the State Supreme Court had been taken, the decree of that Court

would be *res adjudicata*. The authority of the Court on such appeal is more like the review of a case on a writ of error, for errors of law. If a decree was granted affirming the order of the Commission and dismissing the appeal, it would not be a decision on the facts of the case, and it would not be *res adjudicata* as to the facts; and certainly not as to facts going to the jurisdiction of the Commission.

Since the Supreme Court of Michigan has rejected as unconstitutional so much of the statute as authorizes it, on vacating an order of the Commission "to make such other order or decree as the courts shall decide to be in accordance with the facts and the law," we assume that it is not now necessary to first proceed in the State courts; but if that is so, it does not mean that if the special statutory jurisdiction of the State courts is invoked, the decision had therein, is to have the same effect as if the general equity jurisdiction of the State courts or of the Federal courts was invoked.

The full record in the case in the Supreme Court of Michigan is not before the Court, but only a summary thereof. (*Record, p.* 82). We think the proper time to examine that record to see whether the decree of the Court is *res adjudicata* of the cause set up in the present case is after an answer has been put in, in the Court below, and the case is heard on pleadings and proofs on the merits; and that pending such hearing complainant and appellant is entitled to an injunction.

The federal right to attack on the facts the orders of a state railroad commission should be preserved, even where the order has been affirmed by the State courts, in a special statutory proceeding.

The learned counsel for the appellees assume, and the three federal judges assumed, that the bill of the appellant in the Wayne Circuit Court invoked the general equity jurisdiction of the State courts, when it did nothing of the kind.

Since the motion to dismiss was made, Mr. Justice Day has declined to allow a writ of error to review the judgment of the Supreme Court of Michigan, (148 N. W., 385), awarding a mandamus compelling the Detroit & Mackinac Railway Company to put the orders of October 22 and November 3, 1909, into immediate force and effect. The ground of his decision was stated by him as follows:

> "I have examined the papers and find that the judgment of the Supreme Court of Michigan, as shown by the opinion of the Court furnished me, rests upon the holding that the former judgment and proceedings in the State Supreme Court are *res adjudicata* of the matter now in controversy; such being the case, I think the decision comes within the rule that no federal right is denied when the judgment of the State court rests upon a non-federal ground adequate to support it."

The result is that the appellant will not be able to contest the validity of these orders of the Michigan Railroad Commission, in any court of general equity jurisdiction, unless its bill in the District Court of the United States for the Eastern District of Michigan is sustained.

Counsel for appellant have acquired some knowledge of this case from practical experience.

1. The complaint of the Alpena lumbermen initiating the proceedings charged discrimination against Alpena and in favor of Cheboygan, and that charge was met by putting the same rates into effect for Cheboygan as had been agreed upon and were in force for Alpena.

That case was ended; but the Michigan Railroad Commission four months afterwards saw fit to grant the orders of October 22nd and November 3rd, 1909.

2. The appellant then resorted to the special statutory proceedings for a review of the orders, by filing its bill in the Circuit Court for the County of Wayne in Chancery, and in that case met the prima facie case of the Commission with clear and satisfactory evidence, which, coupled with the admissions the Commission had made in its answer, was sufficient to invalidate the orders; but the Supreme Court of the State held that the evidence so produced did not overcome certain evidence obtained by the Commission by *ex parte*, secret and undisclosed investigations and personal examinations, which was not made known to the railroad company and an opportunity given it to rebut the same.

3. The appellant was not allowed a writ of error to review that judgment, and when it filed its bill in the Federal court it was held that the judgment was nevertheless *res adjudicata*.

4. The Supreme Court of Michigan then granted an order compelling the railroad company to put the orders into effect and a writ of error to review that judgment was denied.

5. And all through the proceedings, from beginning to end, the fact that these logging tramways rest in private contracts, and are not subject, and ought not to be subject to governmental control, was studiously ignored.

Hence our reliance on this appeal, which we respectfully submit to this Court as our last resort.

The mills of Justice, like the mills of God, grind slow, but they grind exceeding small.

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Appellant.

Supreme Court of the United States

October Term, 1914.

No. 209.

DETROIT AND MACKINAC RAILWAY COMPANY,
Appellant,

vs.

MICHIGAN RAILROAD COMMISSION, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, FLETCHER PAPER COMPANY, AND FRANK R. GILCHRIST, WILLIAM A. GILCHRIST, GRACE GILCHRIST FLETCHER, AND RALPH E. GILCHRIST, EXECUTORS OF THE ESTATE OF FRANK W. GILCHRIST, DECEASED,
Appellees.

BRIEF FOR APPELLEES.

GRANT FELLOWS,
Attorney General of the State of Michigan.
Solicitor for Appellee,
Michigan Railroad Commission.

EDWARD S. CLARK,
(Of Bay City, Michigan)
Solicitor for Appellees other than Michigan Railroad Commission.

GILLETT & CLARK,
Of Counsel.

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Appellees.

BRIEF FOR APPELLEES.

I. QUESTIONS NOW RAISED BY APPELLANT FOR THE FIRST TIME.

In the court below, the defense of *res judicata* was attacked upon only one ground, viz: that the previous litigation in the State Courts had constituted a legislative, not a judicial proceeding under the rule of the Prentiss case.

Complainant did not claim the existence of any actual difference in the form or subject matter of the proceedings in the State and Federal Courts, but on the contrary specifically alleged (par. 6 of bill, *Record p.* 3), that in the proceedings in the State Courts the railroad company had shown "by clear uncontradicted and conclusive evidence" the very facts that it desired to show in the Federal Court, viz: first—that the logging branches were not subject to the control of the Michigan Railroad Commission; second—that the rates fixed by the Railroad Commission were not locally remunerative, and third—that the rates so fixed would result in the reduction of the railroad company's total net income below the point of reasonable remuneration. This paragraph of the bill of complaint is quoted in appellants' brief (pp. 8-9). It is therefore conceded that the present bill of complaint is filed for the purpose of again proving what the railroad company claims *to have already proved conclusively in the State Courts.* The three Federal Judges in their opinion said:

> "The bill is essentially similar to that filed in the Wayne Circuit Court, recounts the same proceedings, sets up substantially the same grounds of right, and prays for substantially the same relief." (*Record p.* 60).

It was stipulated in the case at bar that "the nature and contents" of the bill of complaint filed in the State Court were "correctly described in the opinion of Judges Knappen, Denison, and Tuttle filed herein." (*Record, p.* 82). This fact also appears from certain paragraphs from the bill of complaint in the State Court which are printed in the present record (*Record, pp.* 82-84). The opinion of the State Circuit Judge (*Record, pp.* 85-88) as well as of the State Supreme Court (*Record, p.* 34 et seq), also show beyond question the precise similarity between appellants' present claims and those made in the state courts. Other significant facts are the nature and scope of the opinion filed by the court below (*Record, pp.* 60-64) and also the fact that all of appellants' "assignments of error" (*Record, pp.* 74-76) are apparently based upon the rule of the Prentiss case. Even the printed brief filed in opposition to our motion to dismiss or affirm, etc., raised no other question. It would therefore be too late to successfully contend (even if such contention were otherwise tenable) that there is any substantial difference between the issues involved in the State and Federal proceedings.

II. ACTUAL SIMILARITY OF STATE AND FEDERAL PROCEEDINGS.

(a) *Subject Matter.*

Appellants' counsel now seek to differentiate the two litigations by saying (*brief, p.* 21), that the present bill of complaint seeks to litigate the "*actual facts*" as distinguished from the *validity of the Commission's orders*. Also (*Brief, p.* 24), that it does not seek to attack the action of the State Courts, but merely attacks the action of the Commission "on the facts." If counsel thereby mean that they are seeking to have the Federal Court review the facts *de novo*, they are asking the court to *make rates* which no court can do. The only province of the Court would be to set aside the action of the commission as confiscatory. This is precisely what the appellant asked of the State Court. In saying that they merely ask a "right to be heard" counsel forget that they have already had a hearing in a court of their own choosing.

When they filed their bill in the State Court they had full liberty of choice. They could then have filed a similar bill or the present bill, in the Federal Court if they had seen fit to do so.

Bacon vs. Rutland R. R. Co., 232 *U. S.* 134.

The above case was decided by this court pending the appeal in the case at bar. The Vermont statute which was held to provide for a *judicial* not a *legislative* review of the proceedings before the Commission, resembled the Virginia statute much more closely than does the Michigan Statute. It did not even require the filing of an original bill as is required by the Michigan practice.

It is incorrect and unfair to say (*Brief, p.* 21), that the State Court disposed of complainant's case by assuming that complainant's evidence was counterbalanced by "*ex parte* secret and undisclosed evidence," etc. Complainants' bill was dismissed because complainant produced *no proof of any kind* in respect to several of the vital questions bearing on the adequacy of the commission rates, and because such evidence as it did produce did not make a prima facie case, or overcome the *evidence in the record* to the contrary. The evidence introduced before the railroad com-

mission comprised only the evidence of seven witnesses covering 123 printed pages (*Record, p.* 82). The *new evidence* offered in the Circuit Court for Wayne County and which came before the State Supreme Court on appeal consisted of the testimony of *26 witnesses* covering 538 printed pages, together with *99 exhibits which had not been introduced on the hearing before the Railroad Commission.* (*Record, pp.* 84-85).

The Railroad Commission, acting as a legislative body, had the right to and did make an actual physical examination of the railroad company's logging branches and the methods there employed. This examination is what counsel characterize as "*ex parte secret* and undisclosed evidence." The Michigan Supreme Court instead of basing its opinion upon this action of the commission, *refused to consider it*, saying:

> "Manifestly this court cannot share in knowledge so acquired, unless evidence of the facts discovered or supposed to have been discovered, is in some way brought upon the record." (*Record, pp.* 35-36, 171 Mich. 347).

There is nothing in the opinion to indicate that the court gave any consideration whatever to anything except the evidence in the record.

(b) *Identity of issues.* (*Appellant's brief, pp.* 24-25).

A former judgment is conclusive not only as to the issues actually raised but also as to *every issue which might have been raised.* The demand or claim, having passed into judgment, cannot again be brought into litigation between the parties upon any ground whatever.

Cromwell vs. Sac County, 94 U. S. 351.
Stockton vs. Ford, 18 How. 418.
Duncan vs. Gegan, 101 U. S. 810.
Dimock vs. Copper Co., 117 U. S. 559.
U. S. vs. County Court, 122 U. S. 306.
Dowell vs. Applegate, 152 U. S. 327.
Gunter vs. R. R. Co., 200 U. S. 273.
U. S. vs. Land Co., 192 U. S. 355 (358).

The provision of the state statute in regard to the burden of proof does not "change the issue." Complainant would have had the burden of proof in any event. If the action

had been first begun in the Federal Court, it would have been necessary to meet the rule that

> "Judicial interference should never occur unless the case presents *clearly and beyond all doubt* such a flagrant attack upon the rights of property under the guise of regulation as to *compel* the court to say that the rates prescribed will *necessarily* have the effect to deny just compensation," etc.
>
> Knoxville vs. Water Co., 212 U. S. 1, and cases cited on pages 16-17.

The issue in the State Court was whether the railroad company had proved certain contentions by "clear and satisfactory evidence." The issue in the Federal Court would be whether the railroad company had proved *the same contentions* "clearly and beyond all doubt." If there is any distinction it is not apparent.

The cases cited on pages 24-25 of appellant's brief distinguish themselves.

(c) *Claimed failure of Michigan Supreme Court to decide questions of fact.* (*Appellant's Brief, pp.* 26-32).

The Michigan Supreme Court decided the questions of fact before it in precisely the same way as the Federal Court or any other court would decide questions of fact in rendering a decision for a defendant in a suit in equity. The complainant in all jurisdictions has the burden of proof. If he fails to prove his contentions his bill is dismissed regardless of the weight of defendant's affirmative evidence. The claim that the Michigan Supreme Court did not pass on thefacts because it held that complainant had not proved its contentions is ludicrous. It specifically considered and decided the following questions:

1. Whether the railroad commission had jurisdiction of the logging branches. (*Record, pp.* 32-34, 171 Mich. 342-344). It decided this question in the affirmative, and the burden of proof had nothing to do with this decision.

2. Whether the commission rates were unreasonable, unduly discriminatory or confiscatory. (*Record, pp.* 32, 34-50, 171 Mich. 344-364). It decided this question in the

negative, holding that the evidence relied upon by complainant to establish its contentions was not sufficient to do so.

3-4. Whether certain orders of the commission in respect to switching charges, not involved in this case were reasonable. This question was answered in the affirmative. (*Record, p.* 50. 171 Mich. 364-365).

As stated in our former brief, the railroad company now asks this court to compel a large number of shippers to continue the payment of excessive rates, merely because it again *offers* to prove what it has totally *failed* to prove after full opportunity to do so.

The authorities above cited establish the rule that judgment is conclusive not only as to the issues actuallly raised but also *as to every issue which might have been raised.*

For the above reasons we see no necessity to consider or discuss the cases cited on pages 26-27 of appellant's brief. The Michigan Court did not definitely say that six per cent or seven per cent or any other amount would constitute an adequate return on the value of the railroad. They held that the complainant had not proved that its net return (if properly computed), was not six, seven, or (we might say), ten per cent. For the purposes of the opinion the Court assumed that the railroad company might be entitled to receive all that it claimed, but held as a matter of fact that it had not proved it would receive less. Counsel ask: (*Brief, p.* 30).

> "What right has anyone to assume that this depreciation did not actually take place when there is absolutely no evidence to the contrary?"

We reply:

> "What right has anyone to assume that this depreciation did actually take place when there was absolutely no evidence to that effect, and the complainant had the burden of proof."

III. JURISDICTION OF COMMISSION OVER LOGGING BRANCHES.

Appellants' counsel throughout their brief constantly refer to the so-called "private logging tramways of Alpena lumbermen." No such things as "private logging tramways" were or are in existence. This phrase was coined by counsel for their own purposes. What counsel refer to are what are usually termed the "logging branches" of defendant's railroad. The nature of these branches is explained in the opinion of the Michigan Supreme Court (*Record, pp.* 37-38). They are to all intents and purposes constructed and owned by the railroad company. The railroad company treated them as a part of its railroad system, even to the extent of including them in its regular published tariffs (*Record, p.* 33). The question whether these branches were subject to the control of the state railroad commission was first raised by appellants' bill of complaint in the State Court. (*Record, pp.* 82-83). It was discussed by counsel for both parties in their briefs filed in the Michigan Supreme Court, (*Record, pp.* 88-89), and was definitely decided by that Court. (*Record, pp.* 32-34. 171 Mich. 342-344). This question involved the construction of the State Statute, and the decision of the State Supreme Court was therefore conclusive.

It will be noticed that the "jurisdiction" attacked is not that of the State Courts but that of the railroad commission, a question peculiarly *within* the jurisdiction of the state courts. For this reason the cases cited on page 32 of appellants' brief are clearly distinguishable. The so-called attacks on the "jurisdiction" of the railroad commission mentioned on page 33 of appellants' brief merely raise questions involving the proper *construction* of the state statute and the facts applicable thereto, all of which were decided by the Michigan Supreme Court and are certainly not the subject either of collateral attack or of repeated and duplicated litigation. The "*jurisdiction*" of the *State Courts* todecide the question whether the logging branches are within the control of the commission, is not and cannot be questioned. If the *correctness* of their decision is questioned, it could be reviewed, if at all, only by writ of error from this court to the State Supreme Court on a record properly raising the question.

IV. WERE THE PROCEEDINGS IN THE STATE COURTS LEGISLATIVE OR JUDICIAL?

PRENTISS CASE.

This question has, we think, been sufficiently discussed in our printed brief filed in this court with our motion to dismiss, affirm, etc., and we beg leave to refer to that brief, instead of reprinting it on this hearing.

To the citations contained in that brief we add:

Bacon vs. Rutland R. R. Co., 232 U. S. 134.

This case has been discussed above and seems conclusive of the instant case.

V. MISCELLANEOUS STATEMENTS IN APPELLANTS' BRIEF.

Certain of counsel's statements require incidental mention.

The statement on page 9 of appellants' brief (quoted from the bill of complaint) that

> "While the Michigan act *is fair on its face*, it was construed and enforced *with an evil eye and a strong hand* and *as so construed* is in conflict with the Fourteenth Amendment,"

brings the case squarely within the rule of the cases cited on pages 9-10 of our brief filed with our motion to dismiss. It is only when an attack can be made upon the statute itself, as distinguished from its *possible or expected* construction, that the Federal Courts can interpose.

The reference on page 9 of appellants' brief to "*ex parte*, secret and undisclosed evidence" has been already discussed.

Counsel's quotations from the Michigan statute do not

include one important section (27 (a)). This is quoted on pages 8-9 of the brief filed with our motion.

It is incorrectly stated (*Brief, p.* 17) that the Virginia statute permits the introduction of different or additional evidence on appeal when the court deems it necessary. The Virginia statute provides:

> "In no case of appeal from the commission shall any new or additional evidence be introduced in the Appellate Court."
>
> Art. 12, Sec. 156 (f) Appellants' *Brief p.* 15).

On page 21 of appellants' brief, counsel argue that the dismissal of complainant's bill in the state courts did not constitute "a final and conclusive adjudication of the *facts* on which the Commission acted." We readily concede that fact. It did, however, constitute a final and conclusive adjudication of complainant's right to judicially attack these particular orders of the commission. The railroad company could still seek further relief upon the facts before the commission itself. In fact, the opinion of the Michigan Supreme Court was expressly made "without prejudice to the right of the railway company to move the commission for a modification of its rules, as its experience and the facts coming to its knowledge may appear to warrant." (*Record, p.* 50. 171 Mich. 365).

Appellant ignores the above paragraph of the opinion and professes to ask the Federal Court to exercise rate-making powers, by a decision *de novo* upon the facts submitted to the commission. What has been finally and conclusively adjudicated is not the continuing propriety of a given schedule of rates as a question of fact, but the right to judicially disturb certain specific orders of the railroad commission, in regard to which appellant has already had its "day in court." This is more fully discussed above.

Respectfully submitted,

GRANT FELLOWS,
EDWARD S. CLARK,
Solicitors for Appellees.

GILLETT & CLARK,
Of Counsel.

DETROIT AND MACKINAC RAILWAY COMPANY *v.* MICHIGAN RAILROAD COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 209. Argued December 2, 1914.—Decided December 14, 1914.

As the constitution of Michigan separates legislative, executive and judicial powers and plainly forbids giving the judicial department legislative powers, this court will not, in the absence of a decision to that effect by the state court, believe that the legislature, in establishing a railroad commission and granting power of review to the courts, intended to clothe them with power to act in a legislative capacity. *Atlantic Coast Line* v. *Prentis*, 211 U. S. 210, distinguished.

Under the Michigan Railroad Commission Act, as construed in the light of the provisions of the constitution of that State, the function of the Supreme Court of the State in reviewing an order of the Commission fixing rates is judicial and not legislative; and its final order or decree sustaining a rate established by the Commission as not con-

fiscatory is *res judicata* and can be so pleaded in another action in the Federal court to prevent the Commission from enforcing such rates.

Where the state court, in construing a statute of the State, has held that the establishment of rules regulating public utility corporations is a legislative function, this court, in the absence of a clear decision of the state court to the contrary, assumes that the same principle applies also to rates. *Michigan Telephone Co.* v. *St. Joseph*, 121 Michigan, 502, followed.

In any ordinary, even though judicial, proceeding a party is bound to present his whole case to the court. *Calaf* v. *Calaf*, 232 U. S. 371.

Whether the railroad commission of Michigan did or did not exceed its jurisdiction in making orders establishing rates, the Supreme Court of the State had jurisdiction, and one seeking to review the orders is bound by the decree of that court.

203 Fed. Rep. 864, affirmed.

THE facts, which involve the construction of the Michigan Railroad Commission Act and the effect of a decree of the Supreme Court of the State sustaining orders of the Commission, are stated in the opinion.

Mr. Fred A. Baker, with whom *Mr. James McNamara* was on the brief, for appellant.

Mr. Edward S. Clark, with whom *Mr. Grant Fellows*, Attorney General of the State of Michigan, was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellant, alleging its railroad to be wholly within the State of Michigan and subject to the jurisdiction of the Michigan Railroad Commission, to prevent the enforcement of two orders of the Commission, respectively reducing certain rates and fixing minimum rates for the transportation of logs. The contention is that the orders take the appellant's property without due process of law, contrary to the Fourteenth

Amendment. The bill alleges that after the passing of the orders the appellant brought a bill in the state court upon the same ground among others; that the testimony before the Commission was introduced with other additional evidence; that, as provided by the Michigan statutes, this further evidence was transmitted to the Commission, which did not modify its orders, and that thereafter the orders were sustained and the bill dismissed by the state Circuit Court, and on appeal by the Supreme Court of Michigan. 171 Michigan, 335. An application for a preliminary injunction in the present cause was heard by three Judges, as required by the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087, § 266, and on their denying the writ an appeal was taken to this court. The decision below is reported in 203 Fed. Rep. 864.

The ground of the decision below was that the petitioner was concluded by the judgment of the Michigan court; and, of course, if the matter properly can be said to be *res judicata*, there is an end of the case. The argument against its being so is drawn from *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; but the applicability of that decision depends upon whether the state courts, in the hearings before them, were acting in a legislative capacity or simply were fulfilling their ordinary function as courts. In Virginia the state constitution itself provided for an appeal from an order by the Commission to the Supreme Court of Appeals and gave that body power to substitute such order as in its opinion the Commission should have made. 211 U. S. 224. It is with regard to an order upon such a preliminary appeal that it is said that even though issuing from a court it would not be a judicial act or effect an adjudication, conclusive if questioned later in a suit. 211 U. S. 226, 227. But the constitution of Michigan, Art. II, separates legislative, executive and judicial powers, and so plainly forbids conferring those given by the Virginia constitution to the Virginia Supreme Court of

Appeals, that in the absence of a clear decision by the state court we should not believe that the legislature attempted to grant or could grant such powers to the courts of Michigan.

The Michigan Statutes though they may not have a perfectly clear vision of the distinctions developed in *Prentis* v. *Atlantic Coast Line*, do not attempt to transgress the limits that the Constitution lays down. The important provisions are that any common carrier or other party in interest dissatisfied with the orders of the Commission may bring a suit in the state Circuit Court in Chancery to set aside the order on the ground that the rates fixed are unreasonable, and the court is given power "to affirm, vacate or set aside the order . . . in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law." If different or additional evidence is introduced, the court before judgment is to transmit a copy of it to the Commission and the Commission may alter or rescind its order and is to report its action to the court, and the judgment is to be rendered as though the last action of the Commission had been taken at first. Public Acts, 1909, No. 300, § 26. Taking the two provisions together it seems plain that the words 'such other order or decree' in the first do not embrace a change in the rates fixed but only such other orders or decrees as are incident to an equity cause. If the order of the Commission is to be modified by fixing a new rate that is to be done upon the new evidence by the Commission. This interpretation not only is the natural one upon the face of the statute but avoids the difficulty that otherwise would arise under the constitution of the State. It is true that the Supreme Court in the case cited said that 'the duty of the courts in the premises is not essentially different from that of the Commission,' 171 Michigan, 346, but we agree with the District Court of three Judges that this must be taken to

mean only that it is the same in respect of the inquiry whether the rate is confiscatory or not. That the establishment of rules is a legislative function is recognized in *Michigan Telephone Co.* v. *St. Joseph*, 121 Michigan, 502, 506, and in the absence of a clear decision to the contrary we shall assume that the principle applies to rates.

The distinction between the judicial function of declaring a rate unreasonable and the legislative one of establishing a rate as reasonable is developed in *Louisville & Nashville R. R.* v. *Garrett*, 231 U. S. 298; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 440; *Janvrin, Petitioner*, 174 Massachusetts, 514. And in *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134, it was held that statutory provisions very like those of Michigan, under a constitution that in like manner separated legislative, executive and judicial powers, gave only the last to the courts. Of course, when once it is established that the bill in the state court was an ordinary though statutory judicial proceeding, we must assume that the plaintiff was bound to present its whole case. *Calaf* v. *Calaf*, 232 U. S. 371, 374. Whether the Commission exceeded its jurisdiction or not, as it purported to make orders the Michigan court had jurisdiction and the appellant is bound by its decree.

Decree affirmed.